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United States 1330

**Circuit Court of Appeals****For the Ninth Circuit.** /

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**FAIRBANKS, MORSE & COMPANY, a Corpora-  
tion,****Plaintiff in Error,****vs.****LEVI P. AUSTIN and JAY R. AUSTIN, Co-  
partners Doing Business Under the Firm  
Name and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN; and NETTIE M.  
AUSTIN, as Trustee,****Defendants in Error.**

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**Transcript of Record.**

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**Upon Writ of Error to the United States District Court of  
the Eastern District of Washington,  
Southern Division.**

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**FILED****DEC 6 - 1922****F. D. MONCKTON,  
CLERK**



**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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**FAIRBANKS, MORSE & COMPANY, a Corpora-  
tion,**

**Plaintiff in Error,**

**vs.**

**LEVI P. AUSTIN and JAY R. AUSTIN, Co-  
partners Doing Business Under the Firm  
Name and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN; and NETTIE M.  
AUSTIN, as Trustee,**

**Defendants in Error.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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[1\*] In the District Court of the United States  
for the Eastern District of Washington.  
Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-  
partners Doing Business Under the Firm  
Name and Style of AUSTIN BROTHERS,  
HELEN S. AUSTIN and NETTIE M.  
AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Foreign  
Corporation,

Defendants.

**Names and Addresses of Attorneys of Record.**

E. E. WAGER, JAMES C. LLOYD, Address,  
Ellensburg, Washington,  
Attorneys for Plaintiffs.

JOHN B. VAN DYKE, JOSIAH THOMAS, Ad-  
dress, Lowman Bldg., Seattle, Wn.,

J. D. CAMPBELL, Address, Old Nat'l Bank Bldg.,  
Spokane, Washington.

Attorneys for Defendants.

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\*Page-number appearing at foot of page of original Transcript  
of Record.



In the Superior Court of the State of Washington  
in and for Benton County.

No. 3083.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-  
partners Doing Business Under the Firm  
Name and Style of AUSTIN BROS.,  
HELEN S. AUSTIN, and NETTIE M.  
AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corpora-  
tion,

Defendants.

### **Complaint.**

The plaintiffs complain of the defendants and  
allege:

#### **I.**

That all times in this complaint mentioned the  
plaintiffs Levi F. Austin and Jay R. Austin were,  
and still are, copartners engaged in the business  
of farming and stock-raising in Benton County,  
State of Washington, under the firm name and  
style of Austin Bros.

#### **II.**

That the plaintiff Helen S. Austin is, and at all  
times in this complaint mentioned was, the wife  
of the plaintiff Levi F. Austin.

#### **III.**

That the plaintiff Nettie M. Austin is the mother

of the plaintiff Jay R. Austin, and now holds, and at all times in this complaint mentioned did hold, in trust for said Jay R. Austin the legal title to an undivided one-half of the following described premises, situate, lying and being in said Benton County, to wit:

The northeast quarter of the southwest quarter of section four (4) in township numbered thirteen (13) north of range twenty-five (25) east of the Willamette Meridian; the legal title and ownership to the remaining moiety of said land being in the plaintiff Levi F. Austin.

[2] IV.

That the defendant is, and at all times in this complaint mentioned was, a foreign corporation organized and existing under the laws of the State of Illinois, and privileged and authorized to transact business in the State of Washington.

V.

That the plaintiffs Levi F. Austin and Jay R. Austin, as such copartners aforesaid, occupy and cultivate in addition to the land hereinbefore described, the north half of the southeast quarter of said section four (4) under the lease of the owner thereof running for five years from the 27th day of October, 1917, with re-leasing privilege.

VI.

That all of said land, excepting only a small acreage thereof is devoted to the cultivation and production of alfalfa, and the greater part thereof has been producing the average yield of alfalfa, common to that section of country, for several

years last past, while a small portion of said acreage has been more recently sown in alfalfa and is of a younger growth.

#### VII.

That said lands are situated in an arid country and no crops can be raised thereon without irrigation.

#### VIII.

That on the 25th day of September, 1919, the plaintiffs Levi F. Austin and Jay R. Austin, co-partners as Austin Bros., entered into a contract in writing with defendants, which was executed by all parties thereto and duly and mutually delivered, whereby defendants agreed, for certain valuable considerations, more fully set forth in said contract, to furnish and deliver to said plaintiffs, Austin Bros., a certain oil engine of 25 H. P., and a certain 8-inch pump, together with pulleys, belts and other accessories, for the agreed price of two thousand four hundred and thirty dollars (\$2430.00) on car at Seattle, Washington, and to be shipped by defendants to said plaintiffs, Austin Bros. at Haven, Washington, on Chicago, [3] Milwaukee & St. Paul Railway, so that delivery could and should be made to said Austin Bros. by December 1, 1919, at said Haven station.

#### IX.

That a copy of said contract and agreement, referred to in the last paragraph hereof, is hereto annexed and made a part of this complaint, and incorporated herein, and marked Plaintiffs' Exhibit "A."



X.

That plaintiffs Austin Bros., at the time of making said contract paid to the defendant the sum of two hundred dollars (\$200.00) in pursuance of said contract.

XI.

That the plaintiffs Austin Bros. were ready and willing to receive said property so contracted to be delivered, and to pay for the same, according to the terms of said contract, and to perform all conditions of said contract, at the time and place aforesaid, of which the defendants had notice, and the said plaintiffs aver that they have fully and faithfully performed and fulfilled all and singular covenants and agreements in the said contract contained on the part of said plaintiffs.

XII.

That the said defendants, totally neglected and disregarding their duties and obligations, under said contract, failed and refused to deliver to said plaintiffs Austin Bros. the said property so agreed to be furnished and delivered to plaintiffs under said contract at said Haven station or elsewhere.

XIII.

That defendants, their agents and servants, by false statements, and misrepresentations made to plaintiffs Austin Bros. between the 1st day of December, 1919, and the 1st day of March, 1920, inclusive, as to the shipment and the status of said machinery contracted for as aforesaid, induced plaintiffs Austin Bros. to rely upon the intention, ability and good faith of defendants, to furnish

the same until on or about the 30th day of March, 1920, when plaintiffs, Austin Bros. despairing of the intention, or ability or [4] good faith of said defendants to furnish said machinery gave said defendants notice of rescission of said contract upon the part of plaintiffs Austin Bros. and of said plaintiffs' demand for return of the said amount of money, advanced to defendants upon said contract, and for payment to plaintiffs Austin Bros. of such damages as said plaintiffs might suffer by reason of defendants' failure, neglect and refusal to fulfill their said contract and obligation.

#### XIV.

The plaintiffs Austin Bros., having abandoned their then existent system of irrigation after entering into said contract with defendants, and because of their reliance upon the fulfillment of said contract by defendants, had deprived themselves of any other means of irrigating their said land except by construction of a new system of pumping or installation of other machinery.

#### XV.

That by reason of defendants' failure to fulfill its said contract, and deliver said machinery to plaintiffs Austin Bros. as in said contract agreed, plaintiffs have sustained damage in the sum of seven thousand dollars (\$7000.00), no part of which has been paid.

And for another and further cause of action against defendants plaintiffs state as follows:

#### I.

That at all times in this complaint mentioned the

plaintiffs Levi F. Austin and Jay R. Austin were, and still are, copartners engaged in the business of farming and stock raising in Benton County, State of Washington, under the firm name and style of Austin Bros.

II.

That the plaintiff Helen S. Austin is, and at all times in this complaint mentioned, was the wife of the plaintiff Levi F. Austin.

[5] III.

That the plaintiff Nettie M. Austin is the mother of the plaintiff Jay R. Austin, and now holds, and at all times in this complaint mentioned did hold, in trust for said Jay R. Austin the legal title to an undivided one-half of the following described premises situate, lying and being in said Benton County, to wit:

The northeast quarter of the southwest quarter of section four (4) in township numbered thirteen (13) north of range twenty-five (25) east of the Willamette Meridian; the legal title and ownership to the remaining moiety of said land being in the plaintiff Levi F. Austin.

IV.

That the defendant is, and at all times in this complaint mentioned was, a foreign corporation organized and existing under the laws of the State of Illinois, and privileged and authorized to transact business in the State of Washington.

V.

That the plaintiffs Levi F. Austin and Jay R. Austin, as such copartners aforesaid, occupy and

cultivate, in addition to the land hereinbefore described, the north half of the southeast quarter of said section four (4) under a lease from the owner thereof running for five years from the 27th day of October, 1917, with releasing privilege.

#### VI.

That all of said land, excepting only a small acreage thereof, is devoted to the cultivation and production of alfalfa, and the greater part thereof has been producing the average yield of alfalfa, common to that section of country, for several years last *page* while a small portion of said acreage has been more recently sown in alfalfa and is of a younger growth.

#### VII.

That said lands are situated in an arid country and no crops can be raised thereon without irrigation.

#### [6] VIII.

That on the 25th day of September, 1919, the plaintiffs Levi F. Austin and Jay R. Austin, co-partners as Austin Bros., entered into a contract in writing with defendants, which was executed by all parties thereto and duly and mutually delivered, whereby defendants agreed, for certain valuable considerations, more fully set forth in said contract, to furnish and deliver to said plaintiffs Austin Bros a certain oil engine of 25 H. P., and a certain 8-inch pump, together with pulleys, belts and other accessories, for the agreed price of two thousand four hundred and thirty dollars (2430.00) on car at Seattle, Washington, and to



be shipped by defendants to said plaintiffs Austin Bros., at Haven, Washington, on Chicago, Milwaukee & St. Paul Railway, so that delivery could and should be made to said Austin Bros., by December 1, 1919, at said Haven station.

IX.

That a copy of said contract and agreement, referred to in the last paragraph, is hereto annexed and made a part of this complaint, and incorporated herein, and marked Plaintiffs' Exhibit "A."

X.

That the said plaintiffs Austin Bros. at the time of making said contract paid to the defendants the sum of two hundred dollars (\$200.00) in pursuance of said contract.

XI.

That the plaintiffs Austin Bros. were ready and willing to receive said property so contracted to be delivered, and to pay for the same, according to the terms of said contract, and to perform all conditions of said contract, at the time and place aforesaid, of all which the said defendants had notice, and the said plaintiffs aver that they have fully and faithfully performed and fulfilled all and singular the covenants and agreements in the said contract contained on the part of said plaintiffs.

[7] XII.

That the said defendants, totally neglecting and disregarding their duties and obligations, under said contract, failed and refused to deliver to said



plaintiffs Austin Bros. the said property so agreed to be furnished and delivered to plaintiffs under said contract at said Haven station or elsewhere.

### XIII.

That defendants, their agents and servants, by false statements and representations made to plaintiffs Austin Bros. between the 1st day of December, 1919, and the 1st day of March, 1920, inclusive, as to the shipment and status of said machinery, contracted for as aforesaid, induced plaintiffs Austin Bros to rely upon the intention, ability and good faith of defendants, to furnish the same until on or about the 30th day of March, 1920, when plaintiffs Austin Bros., despairing of the intention, or ability of said defendants to furnish said machinery, gave said defendants notice of rescission of said contract upon the part of plaintiffs Austin Bros. and of said plaintiffs' demand for return of the said amount of money, advanced to defendants upon said contract, and for payment to plaintiffs Austin Bros. of such damages as said plaintiffs might suffer by reason of defendants' failure, neglect and refusal to fulfill their said contract and obligation.

### XIV.

The plaintiffs Austin Bros., having abandoned their then existing system of irrigation after entering into said contract with defendants and because of their reliance upon the fulfillment of said contract by defendants, had deprived themselves of any other means of irrigating their said

land except by construction of a new system of pumping or installation of other machinery.

XV.

That plaintiffs Austin Bros., despairing of any attention, on the part of said defendants, to said contract or to their duties or obligations thereunder, did on or about the 30th day of March, 1920, proceed to secure and apply the most expeditious and effective means, then known to them for saving as much of the said growing crops [8] alfalfa, on said premises, as could be saved by irrigating said land at such a late stage of the season, and of preventing as far as possible, permanent injury to the said alfalfa meadows.

XVI.

That after much delay, labor and expense, plaintiffs succeeded in securing a right to connect with a certain hydro-electric power system already installed on an adjoining property and to take power from the same, and thereafter immediately constructed therefrom a transmission power line to their said land and installed thereon an electric motor and pump and pumping system, and by *this* means were able, after much delay, to pump the necessary water to irrigate the said land, and to save as much as possible the crops thereon, and to minimize the damage to their said meadows by reason of the lack of irrigation of the same until so late a stage of the season, through failure of said defendants to fulfill their said contract.

XVII.

That plaintiffs have suffered damage in the cost

of the privilege to connect with said hydro-electric power system and the building of said transmission line and the installation of said electric pump and motor and other expenses incident to the installation of said hydro-electric system in the sum of eighteen hundred dollars (\$1800.00) no part of which has been paid.

WHEREFORE plaintiffs pray for judgment against defendant corporation as follows:

I.

For general damages in the sum of seven thousand dollars (\$7,000.00), and for the same of two hundred (200) dollars advanced as alleged in paragraph ten (10) hereof.

II.

For special damages in the sum of eighteen hundred dollars (\$1800.00).

III.

For plaintiffs' costs and disbursements in this behalf expended.

EUGENE E. WAGER and  
JAMES COLLINS LLOYD.

[9] State of Washington,  
County of Kittitas,—ss.

James Collins Lloyd, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiffs, in the above-entitled cause and makes this affidavit on behalf of said plaintiffs for the reason that none of said plaintiffs are now within this county, and for the further reason that all of the material allegations of this com-

plaint are within the personal knowledge of this affiant.

That affiant has read the annexed and foregoing complaint; knows the contents thereof and believes the same to be true.

JAMES COLLINS LLOYD.

Subscribed and sworn to before me this 16th day of February, 1921.

BERNICE N. CHADWICK,  
Notary Public, Residing at Ellensburg, Wn.

Filed with Summons and Plaintiffs' Exhibit  
"A," Mar. 15, 1921, at 8:25 A. M.

[10] **Plaintiffs' Exhibit "A."**

FAIRBANKS, MORSE & CO.

(Incorporated)

GENERAL PROPOSAL.

Sept. 25, 1919.

To Austin Bros.

Beverly, Wash.

We hereby propose to furnish and deliver F. O. B. cars at Seattle, Wash., the following as per specifications below, or in car from factory provided the car can be made up.

ITEMS.

1 25-H.P. Type "Y" oil engine fitted with 40"x10" F. C. Pully "Havana Pot" and exhaust pipe.

1 8" A. H. Z. Y. B. split case pump fitted with 14" Dian x 10" crown face pully.



1 8x10 Dis. *Fill*.

40 ft. 8" 6-ply test special belt.

1 set foundation bats for engine.

#### DELIVERY.

Shipment so delivery Dec. 1, 1919, will be made to be shipped to Austin Bros. at Havin, Wash., via  
(Railroad Station)

Milwaukee. (Give railroad if any preference.)

Additional equipment may be listed on the back of this sheet under heading "Additional Equipment" and will then be furnished by us under this proposal.

#### GUARANTY.

The machinery herein specified is guaranteed by us to be well made, of good material and in a workmanlike manner. If any parts of said machinery fail through defect in workmanship or material within one year from date of shipment thereof, this Company will replace such defective parts, free of charge, F. O. B. cars our factory, but this Company will not be liable for repairs or alterations unless the same are made with our consent and approval. This Company will not be liable for damages or delays caused by such defective material or workmanship, and it is agreed that its liability under all guarantees is expressly limited to the replacing of parts failing through defect in workmanship or material, free of charge, f. o. b. its factory, within the time and in the manner aforesaid. [11] Parts claimed to be defective are to be returned to us at our option, transportation prepaid.

## ADDITIONAL EQUIPMENT.

The following equipment is included in the purchase price of this proposal, and shall be considered a part thereof.

### PRICES.

We propose to furnish the property as specified herein for the sum of \$2430.00 Dollars (\$2430.00) to be paid at the Company's office shown herein, as follows:

### TERMS.

\$200.00            \$400.00 cash with order,

Old Eng. 200

\$500.00 upon installation, 30 days to install.

Balance July 15, 1920, \$500.00 Nov. 15, 1920,  
\$500.00 July 15, 1921, \$530.00 after shipment.

All deferred payments are to be evidenced by negotiable notes payable to the order of this Company, dated and delivered as of the date of shipment and to bear interest from said date at the rate of 8% per cent per annum. The above payments represented by notes are to be secured by lien mdse.

This proposal is made upon the following conditions:

### TITLE.

That the title and ownership of the property herein specified shall remain in this Company until final payment therefor has been made in full as above provided, and in the event that notes are taken at any time, representing deferred payments, or any balance that may be due, or in the event that any judgment is taken on account of all or any part of the purchase price, the title to such prop-

erty shall not pass until such notes, so given or extensions thereof, or such judgment taken, are fully paid in money and satisfied. This Company shall have the right to discount or transfer any of said notes, and the title or right of possession in and to said property shall pass thereby to the legal holder of said notes. \*

[12] You shall take all such legal steps as may be required by the laws of your state for the preservation of this Company's title as herein provided and in the event of default by you in making any of said payments when due as above provided, the full amount of the purchase price, shall at the election of this Company, become immediately due and payable, in which event this Company, or its agents or representatives, shall have the right to take possession of said property wherever found, without process of law, and shall not be held liable for such seizure, and this Company may, at its election, upon written notice to you, deposited in the mails ten (10) days prior thereto, addressed to you at your last known address, sell said property or any part thereof, at public or private sale and at which sale, it shall be optional with this Company to bid for and purchase their property or any part thereof. This Company shall retain so much of the proceeds of such sale necessary to satisfy the balance remaining due, together with the cost of such removal and sale, and any excess shall be paid to you. Should the proceeds of such sale not cover the balance remaining due this Company, together with the

cost of removal and sale, you shall pay the deficiency to this Company forthwith after such sale. The said property shall be and remain strictly personal property and retain its character as such, no matter whether on permanent foundation, or in what manner affixed or attached to building or structure, or what may be the consequences of its being disturbed on such foundation, building or structure, or for what purpose the property may be used.

That the receipt of the property when delivered to you or to your agents shall constitute a waiver of all claims for damages by reason of any delay, and that you will make good to us any loss or damage to said property caused by fire or otherwise, from the time of delivery to you, as herein stated, until the said property is fully paid for, as provided herein.

In the event that it is necessary to employ an Attorney in the collection of any moneys due under this contract you agree to pay Attorney's fees and other expenses incurred in connection therewith.

[13] As a further consideration, you will pay us twenty per cent (20%) of the purchase price stated in this proposal as agreed liquidated damages in the event of your refusing to receive said property when delivered, or in the event of this proposal being countermanded by you after having been accepted by you.

It is expressly understood this proposal made in duplicate contains all agreements pertaining to property herein specified, there being no verbal



understanding whatsoever, and when signed by purchaser and approved by an Executive Officer or Local Manager of Fairbanks, Morse & Co. becomes a contract binding parties thereto.

All items of this proposal are contingent upon and subject to strikes, accidents or other causes beyond our control.

Respectfully submitted.

FAIRBANKS, MORSE & CO.

By A. J. POWELL.

The above proposal is hereby accepted this 25th day of Sept. 1919.

AUSTIN BROS.

c/o LEVI F. AUSTIN.

Signed in presence of:

---

Approved at Seattle, Wn.

FAIRBANKS, MORSE & CO.

By C. R. MILLER, Manager.

Filed with complaint.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. April 1st, 1921. W. H. Hare, Clerk. Edwd. E. Cleaver, Deputy.

[14] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-partners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

### **Bill of Particulars.**

The plaintiffs, above named, responding to the demand of the defendants, for a bill of the particular items of the damages mentioned in the second cause of action in the complaint of the plaintiffs herein, and which constitute the special damages amounting to eighteen hundred dollars (\$1800.00) prayed for in said complaint, herewith and herein submit the following statement of said particular items of damage.

Cost of labor and material used in construction of a transmission, hydro-electric power, line of one and a quarter miles, from the most contiguous existent power line to plaintiffs' premises, including ten poles, cross-arms for said poles, hardware

and insulators, one and a quarter miles of wire,  
and hauling and raising of poles, and digging of  
pole holes, and stringing wire and tying in same  
and fitting poles with cross-arms ..... \$ 355.25

One pump ..... 600.00

Motor rent and repairs of motor ..... 101.50

One 10-inch foot valve ..... 90.00

One 8-inch elbow ..... 20.00

One long radius 10-inch elbow ..... 30.00

One 8-inch gate valve ..... 64.00

One 10-inch long radius elbow ..... 30.00

45 feet of 10-inch iron pipe ..... 135.00

1 8x10 reducer ..... 25.00

Cost of privilege of connecting with exist-  
ent power line ..... 80.00

Cost of hydro-electric power for balance  
of irrigating season from 1st of May,  
1920, or thereabout to pump water to  
irrigate the land described in plain-  
tiffs' complaint ..... 350.00

---

Total ..... \$1880.75

Dated this 3d day of June A. D. 1921.

EUGENE E. WAGER and

JAMES COLLINS LLOYD,

Attorneys for Plaintiffs.

[Endorsed]: Filed in the U. S. District Court,  
Eastern District of Washington. June 4th, 1921.  
W. H. Hare, Clerk.

[15] In the District Court of the United States,  
for the Eastern District of Washington, South-  
ern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-  
partners Doing Business Under the Firm  
Name and Style of AUSTIN BROS.,  
HELEN S. AUSTIN and NETTIE M.  
AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO, a Foreign Corpora-  
tion,

Defendant.

### **Answer and Affirmative Defenses.**

Comes now the defendant above named and without conceding or admitting the materiality or legal sufficiency of the allegations set forth in the first cause of action in the complaint herein, but reserving the right to raise said question upon the trial hereof, answers said first cause of action as follows:

1. Answering the first paragraph of said first cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained and therefore denies the same.

2. Answering the second paragraph of said first cause of action, the defendant says that it has



no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained and therefore denies the same.

3. Answering the third paragraph of said first cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained and therefore denies the same.

4. Answering the fourth paragraph of said first cause of action, the defendant admits each and every allegation therein contained.

5. Answering the fifth paragraph of said first cause of action, the defendant says that it has no knowledge or information [16] sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

6. Answering the sixth paragraph of said first cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

7. Answering the seventh paragraph of said first cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

8. Answering the eighth paragraph of said first cause of action, the defendant admits each and every allegation therein contained, except as modified in the manner hereinafter affirmatively pleaded.

9. Answering the ninth paragraph of said first cause of action the defendant admits each and every allegation therein contained.

10. Answering the tenth paragraph of said first cause of action, the defendant admits each and every allegation therein contained.

11. Answering the eleventh paragraph of said first cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

12. Answering the twelfth paragraph of said first cause of action, the defendant denies each and every allegation therein contained.

13. Answering the thirteenth paragraph of said first cause of action, the defendant denies each and every allegation therein contained, except it admits that plaintiffs gave defendant notice of rescission of said contract upon the part of said plaintiff Austin Bros., and of said plaintiffs' demand for return of the said amount of money advanced to defendant upon said contract.

[17] 14. Answering the fourteenth paragraph of said first cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

15. Answering the fifteenth paragraph of said first cause of action, the defendant denies each and every allegation therein contained, and specifically denies that plaintiffs have sustained dam-

age in the sum of \$7,000.00 or any other sum whatsoever.

And without conceding or admitting the materiality or legal sufficiency of the allegations contained in the second cause of action set forth in the complaint herein, *but* reserving the right to raise said questions upon the trial thereof, defendant answers said second cause of action as follows:

1. Answering the first paragraph of said second cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

2. Answering the second paragraph of said second cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

3. Answering the third paragraph of said second cause of action the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained and therefore denies the same.

4. Answering the fourth paragraph of said second cause of action, the defendant admits each and every allegation therein contained.

5. Answering the fifth paragraph of said second cause of action, the defendant says that it has no knowledge or information sufficient [18] to form a belief as to the truth of any of the allegations therein contained and therefore denies the same.

6. Answering the sixth paragraph of said second cause of action the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

7. Answering the seventh paragraph of said second cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained and therefore denies the same.

8. Answering the eighth paragraph of said second cause of action, the defendant admits each and every allegation therein contained except as modified in the manner hereinafter pleaded affirmatively.

9. Answering the ninth paragraph of said second cause of action, the defendant admits each and every allegation therein contained.

10. Answering the tenth paragraph of said second cause of action the defendant admits each and every allegation therein contained.

11. Answering the eleventh paragraph of said second cause of action the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

12. Answering the twelfth paragraph of said second cause of action, the defendant denies each and every allegation therein contained.

13. Answering the thirteenth paragraph of said second cause of action the defendant denies each



and every allegation therein contained, except it admits that plaintiffs gave defendant notice of rescission of said contract upon the part of said plaintiffs, Austin Bros., and of said plaintiffs' demand for return of the said amount of money advanced to defendant upon said contract.

14. Answering the fourteenth paragraph of said second cause of action, the defendant says that it has no knowledge or information [19] sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

15. Answering the fifteenth paragraph of the second cause of action, the defendant denies each and every allegation therein contained.

16. Answering the sixteenth paragraph of said second cause of action, the defendant says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations therein contained, and therefore denies the same.

17. Answering the seventeenth paragraph of said second cause of action, the defendant denies each and every allegation therein contained, and specifically denies that plaintiffs have suffered damage in the sum of \$1800.00, or any other sum whatsoever.

Further answering the complaint of the plaintiff and the causes of action therein contained, and by way of a first affirmative defense thereto, defendant alleges and states:

1. That on or about the 25th day of September, 1919, it submitted to plaintiff its general proposal

in printing, writing and figures for said pumping equipment described herein, and that the plaintiffs in writing on or about said date accepted said written and printed proposal, and thereafter said written and printed proposal as accepted by plaintiffs in writing, was approved by the Seattle Manager of defendant company, and a copy of said written and printed proposal as accepted by plaintiffs and defendant is hereto attached, marked Exhibit "A," and made a part of this answer.

2. That said written proposal among its several provisions contained the following clause:

"All items of this proposal are contingent upon and subject to strikes, accidents or other causes beyond our control."

3. That defendant accepted said order from plaintiffs which [20] contained the clause above mentioned after it had been signed by plaintiffs; that at the time of the acceptance of said order and continuing until the early summer of the year 1920, there was a great shortage both of labor and material entering into the manufacture of engines and pumps throughout the United States, and defendant was unable to procure the necessary labor and material for the building of said pumps and engines; that by reason thereof manufacturers and sellers of such equipment were unable to make deliveries of their orders, which facts were at all times known to the plaintiffs; that between the date of said order and the 30th day of April, 1920, by reason of said shortage of labor and material defendant was unable to deliver the equipment pur-

chased as aforesaid to the said plaintiffs; that such shortage and conditions could not have been foreseen by defendant, and on account thereof it could not fill said order; that said circumstances preventing said defendant from performing its said contract were entirely beyond the control of defendant, and defendant was without fault on its part; that its said agreement with plaintiffs became impossible of performance and defendant was unable to make delivery of said pumping equipment in accordance with the provisions of its contract.

4. That the clause hereinbefore mentioned and contained in said contract was well known to plaintiffs at the time it was made, and said contract was made with reference thereto.

Further answering said complaint and the two causes of action therein contained, and by way of a second affirmative defense thereto, defendant states and alleges:

1. That on or about the 25th day of September, 1919, it submitted to plaintiffs, its general proposal in printing, writing and figures, for said pumping equipment described therein, and that the plaintiffs in writing on or about said date accepted said written [21] and printed proposal, and thereafter said written and printed proposal as accepted by plaintiffs in writing, was approved by the Seattle manager of defendant company, and a copy of said written and printed proposal as accepted by plaintiffs and defendant is hereto attached,

marked Exhibit "A," and made a part of this answer.

2. That as soon as defendant discovered it could not make delivery of the pumping equipment mentioned and described in said proposal and acceptance, it notified the plaintiffs thereof, and the plaintiffs agreed to the modification of said contract, so as to extend the time of delivery until defendant ascertained when such delivery could be made; that on the 30th day of March, 1920, the said plaintiffs arbitrarily canceled and rescinded said contract.

3. That on or about the 2d day of April, 1920, the defendant offered to furnish said plaintiffs with a temporary unit, consisting of engine and pump, and on the 9th day of April, 1920, it confirmed in writing the said offer to plaintiffs, stating it could furnish to plaintiffs a 25-H. P. Type "Y" oil engine, similar in every respect to the one purchased by them, which it had in stock in Seattle, together with a 4-inch pump that could handle about 550 gallons of water per minute, which it also had in stock in Seattle, to be used by plaintiffs as a temporary equipment until defendant could procure from another source, on thirty days delivery, a new pump similar to the one purchased; that said engine and pump were capable of furnishing all the water necessary for plaintiffs' use during the summer irrigation season of 1920; that defendant also asked plaintiffs to advise it by return mail whether or not its proposition would be accepted, and if it was, defendant would make every



effort to get the equipment ready in short order; that if said proposition had been accepted by plaintiffs, said pumping equipment in its entirety could have been installed and [22] ready for operation in not to exceed seven days from time of acceptance; that on or about the 13th day of April, 1920, the plaintiffs wrote defendant refusing to accept said offer, and on the 15th day of April, 1920, the defendant wired plaintiffs, confirming arrangement for temporary pumping unit and asking if it could ship engine and temporary pump from Seattle; that on the 17th day of April, 1920, defendant again wrote plaintiffs, stating it had the 25-H. P. engine and pump for a temporary installation in Seattle stock, and was holding this equipment until plaintiffs advised it definitely in the matter; that defendant also stated that the engine could be installed permanently, and that the only temporary part would be the pump, and that when the new pump arrived it could be substituted for the temporary pump installed; that on or about the 20th day of April, 1920, the plaintiffs wrote defendant, refusing to accept its proposition to put in a temporary pump and refusing to deal with it any further; that defendant again in writing on the 21st day of April, 1920, submitted to plaintiffs, a proposition to furnish engine and pump from Seattle, which would amply meet plaintiffs' needs until the permanent pump arrived, which offer was also refused by plaintiffs; that had said plaintiffs accepted the offers of defendant to furnish it, the temporary pumping equipment as

aforesaid, no damage would have been sustained by them.

4. That on or about the 30th day of April, 1920, the pumping equipment mentioned in said proposal and acceptance was delivered by defendant to plaintiffs at Hanford, Washington, and said plaintiffs refused to accept delivery of same; that if said equipment had been accepted it could have been installed and in operation within four days thereafter.

Further answering said complaint, and the two causes of action therein contained, and by way of a third affirmative defense [23] thereto, defendant states and alleges:

That any damage sustained by the plaintiffs as alleged in their complaint, was due to their failure to use ordinary endeavors to get another pumping equipment to meet their needs or to accept the several offers made by defendant to furnish them a temporary equipment to meet their needs; that there were plenty of engines and pumps in the markets of Seattle, Spokane, Yakima, Toppenish and Kennewick, all in the state of Washington, suitable for the needs of plaintiffs, which could have been procured by them if they had been willing to do so and which could have been procured by the defendant for plaintiffs, had they permitted it to do so.

Further answering said complaint and the two causes of action therein contained, and by way of a fourth affirmative defense thereto, the defendant states and alleges:

That the damages claimed by plaintiffs to be the result of the failure of the defendant to deliver the pumping equipment mentioned in the complaint herein, were not such damages as were within the contemplation of the parties at the time the contract was made, and they are too remote and speculative to be considered.

WHEREFORE, defendant prays that plaintiffs' complaint be dismissed and that it do have and recover its costs herein.

VAN DYKE & THOMAS,  
Attorneys for Defendant.

State of Washington,  
County of King,—ss.

Josiah Thomas, being first duly sworn upon his oath, says: That he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing answer and affirmative defenses and believes the same to be true, and affiant further says that said defendant is a nonresident of the State of Washington, wherein this suit is brought, and is a corporation duly organized under the laws of the State of Illinois, with its principal place of business in the city of Chicago, in said state, and affiant makes this verification for the reason that said defendant has no officer in the state of Washington, where this [24] action is brought, and it is a nonresident of said state.

JOSIAH THOMAS.

Subscribed and sworn to before me this 29th day of July, 1921.

LOUIS E. SHELA,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

**Exhibit "A."**

[25] FAIRBANKS, MORSE & CO.

(Incorporated)

**GENERAL PROPOSAL.**

Sept. 25, 1919.

To M—— Austin Bros., Purchaser.

Beverly, Wash.

We hereby propose to furnish and deliver F. O. B., cars at Seattle, Wash., or *on car fro* from factory provided the car can be made up, the following as per specifications below:

**ITEMS.**

1-25 Type "Y" Oil Engine, fitted with 40 x 10 F. C. Pulley, "Havana Style, and exhaust pipe,

1-8" A. H. Z. Y. B. split case pump fitted with 14" Diam. x 10" face crown pulley.

1-8 x 10 Dischg. Ell.

40 ft. 8" 6 Ply test special belt,

1 set foundation bolts for engine,

**DELIVERY.**

Shipment so delivery Dec. 1, 1919 will be made to be shipped to Austin Bros., at Haven, Wash., via Milwaukee.

Additional equipment may be listed on the back of this sheet under heading "Additional Equipment" and will then be furnished by us under this proposal.



**GUARANTY.**

The machinery herein specified is guaranteed by us to be well made, of good material and in a workmanlike manner. If any parts of said machinery fail through defect in workmanship or material within one year from date of shipment thereof, this Company will replace such defective parts, free of charge, f. o. b. cars our factory, but this Company will not be liable for repairs or alterations unless the same are made with our written consent and approval. This Company will not be liable for damages or delays caused by such defective material or workmanship, and it is agreed that its liability under all guarantees is expressly limited to the replacing of parts failing through defect in workmanship or material, free of charge f. o. b. its factory within the time and in the manner aforesaid. Parts claimed to be defective are to be returned to us at our option, transportation prepaid.

**ADDITIONAL EQUIPMENT.**

The following equipment is included in the purchase price of this proposal, and shall be considered a part thereof.

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**[26] PRICES.**

We propose to furnish the property as specified herein for the sum of \$2430.00 Dollars (2430) to be paid at the Company's office shown herein, as follows:

\$200            \$400.00 cash with order,

Old engine 200.

\$500.00 upon installation, 30 days for installing,

Balance \$ July 15, 1920, \$500.00, Nov. 15, 1920,

\$500 July 15, 1921, \$530.00 after shipment.

#### TERMS.

All deferred payments are to be evidenced by negotiable notes payable to the order of this Company, dated and delivered as of the date of shipment and to bear interest from said date at the rate of 8% per annum. The above payments represented by notes are to be secured by lien on mdse.

#### TITLE.

THIS PROPOSAL IS MADE UPON THE FOLLOWING CONDITIONS: That the title and ownership of the property herein specified shall remain in this Company until final payment therefore has been made in full as above provided, and in the event that notes are taken at any time, representing deferred payments, or any balance that may be due, or in the event that any judgment is taken on account of all or any part of the purchase price, the title to such property shall not pass until such notes, so given, or extensions thereof, or such judgment taken, are fully paid in money and satisfied. This Company shall have the right to discount or transfer any of said notes, and the title or right of possession in and to said property shall pass thereby to the legal holder of said notes.

You shall take all such legal steps as may be required by the laws of your state for the preservation of this Company's title as herein provided and in the event of default by you in making any of said payments when due as above provided, the full amount of the purchase price shall, at the election of this Company, become immediately due and payable, in which event this Company, or its agents or representatives, shall have the right to take possession of said property, wherever found without process of law, and shall not be liable for such seizure, and this Company may, at its election, upon written notice to you, deposited in the mails ten (10) days prior thereto, addressed to you at your last known address, sell said property or any part thereof, at public or private sale and at which sale, it shall be optional with this Company to bid for and purchase their property or any part thereof. This Company shall retain so much of the proceeds of such sale necessary to satisfy the balance remaining due, together with the cost of such removal and sale, and any excess shall be paid to you. Should the proceeds of such sale not cover the balance remaining due this Company, together with the cost of removal and sale, you shall pay the deficiency to this Company forthwith after such sale. The said property shall be and remain strictly personal property and retain its character as such, no matter whether on permanent foundation or in what manner affixed or attached to building or structure, or what may be the consequences of its

being disturbed on such foundation, building or structure, or for what purpose the property may be used.

That the receipt of the property when delivered to you or to your agents shall constitute a waiver of all claims for damages by reason of any delay, and that you will make good to us any loss or damage to said property caused by fire or otherwise, from the time of delivery to you, as herein stated, until the said property is fully paid for, as provided herein.

In the event that it is necessary to employ an Attorney in the collection of any moneys due under this contract [27] you agree to pay Attorney's fees and other expenses incurred in connection therewith.

As a further consideration, you will pay us twenty per cent (20%) of the purchase price stated in this proposal as agreed liquidated damages in the event of your refusing to receive said property when delivered, or in the event of this proposal being countermanded by you after having been accepted by you.

It is expressly understood this proposal made in duplicate contains all agreements pertaining to property herein specified, there being no verbal understanding whatsoever, and when signed by purchaser and approved by an Executive Officer or Local Manager of Fairbanks, Morse & Co., becomes a contract binding parties hereto.



All items of this proposal are contingent upon and subject to strikes, accidents or other causes beyond our control.

Respectfully submitted,

FAIRBANKS, MORSE & CO.

By A. J. POWELL.

The above proposal is hereby accepted this 25th day of Sept. 1919.

AUSTIN BROS.

By LEVI F. AUSTIN.

Signed in the presence of

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Approved at Seattle, Wn.

FAIRBANKS, MORSE & CO.,

By C. R. MILLER,

Manager.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 10, 1921. Wm. H. Hare, Clerk. Edwd. E. Cleaver, Deputy.

[28] In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN as TRUSTEE,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendants.

### **Reply.**

The plaintiffs, reserving the right to raise, upon the trial of the above-entitled cause, the question of the materiality and legal sufficiency of the allegations contained in and constituting the first affirmative defense set up in defendants' answer herein, now reply to the allegations contained in said affirmative defense as follows:

#### **I.**

Replying to the first paragraph of first affirmative defense, plaintiffs deny that the paper attached to said defendants' answer herein, as served upon plaintiffs, and marked Exhibit "A," is a copy of the written and printed proposal as ac-

cepted by plaintiffs and defendants on the 25th day of September, 1919.

## II.

Replying to the second paragraph of said first affirmative defense, plaintiffs deny each and every allegation in said paragraph contained.

## III.

Replying to the third paragraph of said first affirmative defense, plaintiffs deny each and every allegation, and all of the allegations in said third paragraph contained.

## IV.

Replying to the fourth paragraph of said first affirmative defense plaintiffs deny each and every allegation in said fourth paragraph contained.

[29] Plaintiffs, reserving the right to raise upon the trial, of the above-entitled cause, the question of the materiality and legal sufficiency of the allegations contained in and constituting the second affirmative defense, set up in defendants' answer herein, reply to the allegations contained in said second affirmative defense as follows:

## I.

Replying to the first paragraph of said second affirmative defense plaintiffs deny that the paper attached to defendants' answer herein, as served upon plaintiffs, and marked Exhibit "A," is a copy of the written and printed proposal as accepted by plaintiffs and defendants on the 25th day of September, 1919.

II.

Replying to the second paragraph of said second affirmative defense plaintiffs deny each and every allegation in said second paragraph contained except the allegation that on the 30th day of March, 1920, the plaintiffs rescinded said contract.

III.

Replying to the third paragraph of said second affirmative defense plaintiffs deny each and every allegation, and all of the allegations, in said paragraph contained except as hereinafter specifically admitted.

IV.

Plaintiffs admit, that under date of the 9th of April, 1920, the defendants wrote plaintiffs acknowledging receipt of plaintiffs' letter of 30th of March, 1920, rescinding said contract, the subject of this action, and admitting defendants' failure and inability to fulfill said contract, or to substitute any pumping equipment satisfactory to plaintiffs, or adequate to furnish water to irrigate plaintiffs' lands, within the time necessary to save plaintiff's crops, or to relieve the situation in which said defendants had placed plaintiffs by their said failure, but proposing to temporarily furnish a twenty-five horse-power engine, and a four-inch pump to be shipped thereafter from Seattle.

[30] Plaintiffs also admit that, under date of 17th of April, 1920, defendants wrote plaintiffs stating that they, defendants, had on the 15th of April, 1920, telegraphed to plaintiffs a renewal



of their said proposal of the 9th of April, 1920, and requesting an answer thereto. Plaintiffs also admit that defendants wrote plaintiffs on the 21st of April, 1920, renewing their proposal of the 9th of April, 1920, to install an engine and a four-inch pump, and that plaintiffs replied to said letter of the 21st of April, 1920, on the 26th of April, 1920, stating that defendants well knew, that, considering the depth of plaintiffs' well and the consequent lift of water and the acreage of land to be irrigated by the proposed plant contracted for with defendants, a four-inch pump would be totally inadequate and of little or no service or value in the circumstances named.

#### V.

Replying to the fourth paragraph of said second affirmative defense plaintiffs deny each and every allegation in said fourth paragraph contained.

Plaintiffs, reserving the right to raise upon the trial, of the above-entitled cause, the question of the materiality and legal sufficiency of the allegations contained in and constituting the third affirmative defense, set up in defendants' answer herein, reply to the allegations contained in said third affirmative defense as follows:

#### I.

Replying to the third affirmative defense, set up by said defendants in their said answer, and to the allegations in said third affirmative defense contained, plaintiffs deny each and every allegation, and all of the allegations, in said third affirmative defense contained.

The plaintiffs, reserving the right to raise, upon the trial of the above-entitled cause, the question of the materiality and legal sufficiency of the allegations contained in and constituting the fourth affirmative defense set up in defendants' answer herein, now reply to the allegations contained in said fourth affirmative defense as follows:

[31] I.

Replying to the fourth affirmative defense, set up by said defendants, in their said answer in the above-entitled case, and to the allegations in said fourth affirmative defense contained, plaintiffs deny each and every allegation, and all of the allegations in said fourth affirmative defense contained.

And further replying to said four affirmative defenses, set up in defendants' said answer in this action, and by way of new and affirmative matter, plaintiffs allege:

I.

That when defendants entered into the contract, the subject of this action referred to in said affirmative defenses, a true and correct copy of which said contract is annexed to plaintiffs' complaint in this action and marked 'Plaintiffs' Exhibit "A" the said defendants had a thorough, complete and comprehensive knowledge and understanding of the conditions, existent and prospective of the labor market obtaining throughout the United States and of the general industrial, economic, and transportation situation existing, and prospective, throughout the United States, and

entered into said contract, and induced plaintiffs to enter into said contract, at said time, when defendants well knew and thoroughly realized all of said conditions obtaining as to labor, and industry and transportation in the United States, and the defendants had all of said conditions in contemplation, and assumed all risks incident to said conditions, when they entered into said contract.

## II.

That it was well known by defendants, and by their agents and servants, at the time said contract, the subject of this action, was made and entered into, and at all times in this reply mentioned, that plaintiffs had at the time they made and entered into said contract, and in reliance on the fulfillment thereof by the defendants, abandoned all means of pumping water, for irrigation of their land, more fully described in the complaint herein, which they had previously used, and had sold their former pumping equipment to defendants, as a part of the purchase price of the new equipment, contracted [32] from defendants, and that owing to changes in their irrigation system, to accommodate said new equipment, and enlargement of their acreage of irrigable land and equipment of the character and capacity so contracted, as aforesaid, was indispensably necessary to properly irrigate said land, and save the crops thereon during the spring and summer of 1920, and that failure to have said equipment installed and in operation by the beginning of the irrigating

season, of 1920, in the section of country in which plaintiffs' lands were situated, would subject plaintiffs to the total or partial loss of their said crops; and such damage as plaintiffs might suffer in such contingency, and defendants' liability therefor were in the contemplation of the parties to said contract at the time said contract was made and at all times thereafter.

### III.

That the defendants well knew, and it was in the contemplation of all parties to the said contract, at the time of entering into said contract, that unless said machinery was supplied according to the terms of said contract, or at least in time to be installed on plaintiffs' premises by the beginning of the irrigating season of 1920, in the section of the country in which plaintiffs' lands are situated, or in the event that it could not be so furnished by defendants that plaintiffs had timely notice of defendants' inability to fulfill their said contract, so that plaintiffs could seasonably obtain and install other adequate machinery, that the loss of plaintiffs' crops would be the inevitable correlary, and that defendants would be answerable in damages therefor.

### IV.

That, well knowing all of the facts alleged in the three preceding paragraphs hereof, and that said machinery had not been shipped, and in order to mislead and deceive the plaintiffs, the defendants, their agents, and servants wrongfully, falsely, and fraudulently, represented to plaintiffs that said



machinery had been shipped late in the month of December, 1919, and plaintiffs believed said false representations and relied thereon and defendants continued to leave plaintiffs in that belief, and in that false sense of [33] security, and to deny plaintiffs any further information in respect of said machinery, or to reply to plaintiffs' many inquiries regarding said machinery, or the shipment or status thereof, until the 9th of April, 1920, and until after plaintiffs had previously rescinded said contract on the 30th day of March, 1920.

WHEREFORE plaintiffs pray that they be granted the relief demanded in their complaint herein.

EUGENE E. WAGER and  
JAMES COLLINS LLOYD,  
Attorneys for Plaintiffs.

State of Washington,  
County of Kittitas,—ss.

James Collins Lloyd, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiffs in the above-entitled cause, and that he has read the foregoing *replication*; knows the contents thereof and believes the same to be true.

That he makes this verification for and on behalf of the plaintiffs in said cause for the reason that none of said plaintiffs are now within this county or capable of making said verification.

JAMES COLLINS LLOYD.

Subscribed and sworn to before me this 9th day of August, 1921.

BERNICE N. CHADWICK,  
Notary Public, Residing at Ellensburg, Wn.

[Endorsed]: Filed in the U. S. District Court Eastern District of Washington. August 23d, 1921. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

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[34] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. —.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-partners Doing Business Under the Firm Name and Style of AUSTIN BROS.,  
HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

**Notice of Motion for Leave to Amend Complaint.**

To the Above-named Defendant and to Messrs. Van Dyke & Thomas, Its Attorneys of Record:

You, and each of you, will please take notice that plaintiffs will on the 10th day of October, 1921, at ten o'clock in the morning, or as soon

thereafter as counsel can be heard, call up for hearing before the said Honorable Court, in open court at Yakima, Washington, their motion for leave to amend plaintiffs' complaint in this action, a copy of which motion and proposed amendments is herewith served upon you.

Dated this the 1st day of October, A. D. 1921.

EUGENE E. WAGER and  
JAMES COLLINS LLOYD,  
Attorneys for Plaintiffs.

[Endorsed]: Filed in the U. S. District Court  
Eastern District of Washington. Oct. 10th, 1921.  
W. H. Hare, Clerk. Edwd. E. Cleaver, Deputy.

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[35] In the District Court of the United States  
for the Eastern District of Washington, South-  
ern Division.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-  
partners Doing Business Under the Firm  
Name and Style of AUSTIN BROS.,  
HELEN S. AUSTIN and NETTIE M.  
AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Cor-  
poration,

Defendant.

**Motion for Leave to Amend Complaint.**

Come now the plaintiffs in the above-entitled

cause, appearing by their attorneys Eugene E. Wager and James Collins Lloyd, and respectfully move this Honorable Court for leave to amend plaintiffs' complaint herein in the manner following, to wit:

By inserting, immediately after the tenth paragraph, and on the third page of said complaint, and immediately after the tenth paragraph, and on the seventh page of said complaint, a new paragraph, denominated paragraph ten and a half in the words and figures following, to wit:

X $\frac{1}{2}$ .

“That the said machinery, contracted for as aforesaid, was purchased by the said plaintiffs to be used by them in pumping water from a newly constructed well on their said land, during the irrigating season of 1920, and subsequent years, to irrigate all of the land hereinbefore described, which was then under cultivation, the said well being supplied by a direct, continuous, and abundant and sufficient flow of water from the Columbia River, to which it was in close proximity, and the said plaintiffs relying upon the fulfillment of said contract by defendants, had from the time of entering into said contract, and by reason thereof, abandoned, and deprived themselves of all other means of irrigating said land, all of which facts were well known to defendant, their agents, and servants at the time said contract was made and at all times thereafter.”

[36] And plaintiffs further move this Honorable Court for leave to amend said complaint, by



inserting immediately after the word "paid" in the fifth line of the fifteenth paragraph, on page 5, of said complaint the following allegation:

"The said damages consisting, first, in the loss of 250 tons of alfalfa hay, of the value of \$5000.00 (Five Thousand Dollars), which would have grown and been harvested on said land, in excess of the quantity of alfalfa that did grow and was harvested thereon, during the crop year of 1920, if said defendants had fulfilled their said contract, so that plaintiffs could have pumped water to irrigate said land at and during the time they were deprived of the means of pumping water, by reason of the failure of defendants to fulfill the said contract, but which alfalfa was lost to plaintiffs by reason of plaintiff not being able to pump any water, to irrigate said land, for about six weeks or more after the time when said land should have begun to be irrigated, because of defendant's failure to furnish said machinery as agreed in said contract or in time to enable plaintiffs to begin pumping water aforesaid in time to save said crop. And secondly, by the total destruction of the alfalfa plant, and the roots thereof, on seven acres of said land, and permanent injury to the alfalfa plant on thirty-five additional acres of said land, by reason of the deprivation of the means of pumping water, to properly irrigate said land, as aforesaid, because of the failure of defendants to fulfill said contract; the said last-mentioned

injury to said forty-two acres of land causing plaintiffs additional damage in the sum of \$2000.00 (Two Thousand Dollars).''

This motion is based upon the files and records of this court in this cause and the annexed affidavit.

Dated this first day of October, 1921.

EUGENE E. WAGER and  
JAMES COLLINS LLOYD,  
Attorneys for Plaintiffs.

[Endorsed]: Filed in the U. S. District Court Eastern District of Washington. Oct. 10th, 1921. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

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[37] In the District Court of the United States for the Eastern District of Washington, Southern Division.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-partners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

**Affidavit in Support of Amendment to Complaint.**

State of Washington,  
County of Kittitas,—ss.

James Collins Lloyd, being first duly sworn, deposes and says:

That he is one of the attorneys for plaintiffs in the above-entitled cause and that plaintiffs have, herein, a meritorious cause of action, and that the amendments to plaintiffs' complaint, moved for by plaintiffs, are necessary to properly and legally state plaintiffs' cause of action and are made in good faith and are not for purpose of delay.

The *the* allegations contained in said amendments were omitted from the complaint by oversight and inadvertence and that defendant can not be delayed, surprised or prejudiced by said amendments or either of them.

JAMES COLLINS LLOYD.

Taken, subscribed and sworn to before me this  
1st day of October, A. D. 1921.

[Seal]                      BERNICE N. CHADWICK,  
Notary Public in and for the State of Washing-  
ton, Residing at Ellensburg.

[38] In the District Court of the United States for the Eastern District of Washington, Southern Division.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-partners Doing Business Under the Firm Name and Style of AUSTIN BROS.,  
HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendants.

**Affidavit of Service of Motion for Leave to Amend Complaint.**

State of Washington,  
County of Kittitas,—ss.

James Collins Lloyd, being first duly sworn upon oath, deposes and says: That he is one of the attorneys for the plaintiffs in the above-entitled cause, and that he served the motion for leave to amend the complaint and also the notice of motion and affidavit attached thereto upon the defendants by delivering to and leaving with them a true and correct copy of said motion for leave to amend notice of motion and affidavit on Josiah Thomas, one of the attorneys for the said defendants, personally in King County, State of Washington, on the 3d day of October, A. D. 1921, between the hours of



nine o'clock in the morning and four o'clock in the afternoon by delivering to and leaving with said Josiah Thomas a true and correct copy of each of said papers.

JAMES COLLINS LLOYD.

Subscribed and sworn to before me this 5th day of October, 1921.

[Seal]              BERNICE N. CHADWICK,

Notary Public, Residing at Ellensburg, Wn.

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[39] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 4542.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-partners Doing Business Under the Firm Name and Style of AUSTIN BROS.,  
HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

**Bill of Exceptions.**

This was an action at law to recover both general and special damages for failure to deliver a certain pumping equipment within the time re-

quired by the provisions of a writtent contract between plaintiffs and defendant.

This case came on duly and regularly for hearing before the Honorable F. H. Rudkin, Judge, and before a jury, in the above-entitled court, at Yakima, Washington, on October 11, 1921, at ten o'clock A. M.

The plaintiffs were represented by their attorneys and counsel, Messrs. E. E. Wager and J. C. Lloyd, of Ellensburg, Washington. The defendant was represented by its attorneys, Mr. J. D. Campbell, of Spokane, Washington, and Mr. Josiah Thomas, of the firm of Van Dyke & Thomas, of Seattle, Washington.

Thereupon the following proceedings were had:

[40] Mr. WAGER.—May it please your Honor, there is a motion for leave to amend the complaint and we don't know whether the defendant will resist it or not.

The COURT.—I have read the proposed amendment.

Mr. THOMAS.—May it please the Court, this amendment was served upon us about eight days ago, and this case has been set for some time. It is somewhat late, and as I understand it, counsel for the plaintiffs have obtained an order for shortening the time of service for this proposed amendment. If the amendment is to be allowed, we want to demand that the amendment be made more definite and certain so as to conform with the general rule of damages in cases of this character. Your Honor will note that in addition they desire to

make on page 5 of the complaint, in which they change their first cause of action from general damages to special damages, they say that said damages consisted, first, in the loss of two hundred and fifty ton of alfalfa hay of the value of five thousand dollars, which would have grown on said land, etc. If this amendment is to be allowed, there should be a deduction made for producing and harvesting and marketing and irrigating this particular alfalfa.

The COURT.—Oh, yes, these deductions would be made in the instructions of the Court, the measure of damages there is not the correct one.

Mr. THOMAS.—They should specify the loss of profits they have sustained so we could check them off, the amount should be made definite and certain in that respect. Furthermore, in the last paragraph [41] of this proposed amendment they allege that the seven acres of land was totally destroyed, they also allege permanent injury to thirty-five acres and lump the whole sum together at two thousand dollars.

The COURT.—How do they claim the land was permanently destroyed, from want of water? It had been in that same condition for all time.

Mr. THOMAS.—(Reading:) “And secondly by the total destruction of the alfalfa plant and the roots thereof on seven acres of said land and permanent injury to the alfalfa plant on thirty-five additional acres of land by reason of the deprivation of the means of pumping water to properly irrigate said land as aforesaid, because of the

failure of defendant to fulfill said contract, the said last mentioned injury to said forty-two acres of land causing plaintiffs additional damage in the sum of two thousand dollars.”

We believe we should be notified so that we would know what we are expected to meet in response to the issues in this case.

Mr. LLOYD.—May it please your Honor, the damages to the crops growing on the forty-two acres of land is alleged in this way, and secondly by the total destruction of the alfalfa plant and the roots thereof on seven acres of said land and permanent injury to the alfalfa plant on thirty-five additional acres of said land by reason of the deprivation of the means of pumping water to properly irrigate said land, etc. We don’t allege the land is destroyed, we allege the alfalfa plants and the roots.

Mr. THOMAS.—We want to raise the question at this time that the failure of the defendant to deliver this pumping plant was not the [42] proximate cause for the loss of these crops and subsequent loss of the profits to the plaintiffs in this case,—that was a secondary result. If your Honor wants to hear argument on that proposition we are ready to go ahead, if not, we will take it up later.

The COURT.—That situation will arise during the trial.

Mr. THOMAS.—We want to present our objections at this time, if the Court please.



The COURT.—I will allow the amendment and will limit recovery to the property rights in my charge to the jury and proceed with the trial, Gentlemen.

Mr. THOMAS.—Your Honor will grant us an exception to the Court's ruling.

The COURT.—Yes.

Thereupon the following testimony was taken in said case:

### **Testimony of Levi Austin, for Plaintiffs.**

LEVI AUSTIN, produced as a witness on behalf of the plaintiffs, after being duly sworn, on direct examination, testified as follows:

My name is Levi Austin. In 1919 I was engaged in the business of farming, in conjunction or association with my brother, Jay R. Austin, as we were doing business as Austin Bros. We resided about eleven miles West of White Bluffs, in Section 4 Township 13 North, Range 25, Benton County; this is the land described in the complaint. We were engaged in general stock raising, and general farming,—mostly cultivation of alfalfa. (It was admitted by counsel for defendant that if a certain witness were present she would testify that a part of the land [43] described in the complaint was held in trust by her for the plaintiffs.)

My brother and I own sixty-eight acres of deeded land and eighty acres under lease. In 1919 there was about thirty-eight acres of alfalfa on the deeded land and on the leased land there was about

(Testimony of Levi Austin.)

twenty acres, all seeded alfalfa from the year before, and about fifteen acres that were seeded that year in the fall.

Mr. THOMAS.—We want to object to the introduction of any testimony as to damages for any loss of crops, because under the issues of this case it is not a proper element of damages, going not to proximate cause but secondary cause, and we would like to have an objection to all that testimony.

The COURT.—Counsel has not reached that subject. Your objection is overruled for the present.

Mr. THOMAS.—Exception.

This is the lease we had for the eighty acres in question. (Lease offered in evidence and marked Plaintiffs' Exhibit "A.") It was impossible to raise anything on this land, even rye, without irrigation. We planted rye several years, but had no success with that. It is susceptible of raising crops when properly irrigated. In September, 1921, we entered into a contract with the defendant, Fairbanks, Morse & Co.

(Contract offered in evidence and received as Plaintiffs' Exhibit "B.")

Under the contract they delivered to us one article, a belt. We did not use it, it is still there. It was delivered at the station of Haven, where the rest of the machinery was supposed [44] to be delivered. Haven, Washington, is the nearest railroad station to our place. It is on the Milwaukee railroad, about two and one-half miles away.

(Testimony of Levi Austin.)

Mr. THOMAS.—Attorney for Defendant, said: For the purpose of shortening the testimony we will admit that contract was made and entered into and that the contract was not completed on or before March 31, 1920, and the only question, it seems to me, is the question of damages.

The COURT.—That is the date on which plaintiffs abrogated the contract.

Mr. WAGER.—On the 30th of March.

The COURT.—Well, with that understanding the only question is damages.

Mr. WAGER.—They alleged that they didn't deliver it, intended to deliver it and didn't deliver it because plaintiffs extended the time from time to time, as I understand.

The COURT.—That is a matter of defense, however.

Mr. WAGER.—Then I understand they admit the machinery was not delivered.

The COURT.—Prior to March 30, 1920.

Mr. THOMAS.—The machinery was not delivered prior to March 30, 1920, after the contract was rescinded that time, and the only question is the question of damages, your Honor.

The WITNESS, continuing, said: We had other means or sources of irrigating our lands in 1919, that is, we completed the well that season and used it that [45] season. We had a 15-horsepower engine of the same type that we ordered, connected with a 5" pump. The water was pumped from a new well we used for the season of 1919.

(Testimony of Levi Austin.)

In the year 1920 we had no means of irrigating these lands. We contemplated and planned on using this machinery that we had ordered and we were given to understand that that machinery would be delivered in plenty of time and we wrote a number of letters to the Company asking for information in regard to it, and these letters were not answered. We depended on getting this plant and we took out the old plant. The old plant was not satisfactory at all, in fact, in 1919, we lost about all the crop on account of the old plant. Our lands were partly irrigated in 1920. We were compelled to put in another outfit, one we picked up at a different place,—pump one place and motor another place, and we started irrigating about the 20th of May. We got over our lands between the 20th day of June and the 1st of July. It took us about four weeks to go over the place. We used an 8" pump, practically the same sized pump we had ordered from Fairbanks, Morse. We happened to get this pump from a man down the river about fifteen miles, we had it connected to a 15-horsepower motor. We arranged for electric power from Von Herberg paying him \$800.00 for the privilege of connecting on his line, then we had to string a line out from his line. Von Herberg has a ranch next to us, he is a moving-picture man. This machinery has been used ever since. We have not been able to purchase any other machinery. We were so badly damaged we did not have any crop whatever that year, and we



(Testimony of Levi Austin.)

have not been able to get an outfit that we wanted, and we have had to use temporary machinery we put in there, that machinery is not satisfactory. Most of it is in use, some is not. We have not been able to improve much, we are planning to change as soon as we can. [46] We have practically the same equipment in that we put in temporarily because we have not been able to make the change. The upper tract of our land, the thirty-five acres, was in alfalfa. It was practically all old seeding, that is, it was over three years old. A temporary plant that we purchased was all right after we got started and was effective and sufficient for the irrigation of our land in the year 1920. We got started the 20th day of May. In that section of the country it is necessary to begin irrigating April 1st. We didn't begin until May 20. About the 25th or 26th of March I came over to Yakima to see if there would be any possible chance of getting an outfit, and machinery was so scarce, and I went to A. B. Fossein & Co. and they informed me they had a pump that would answer our purpose down below us and that we could probably get us a 20-horsepower motor to go with that pump. I told them the position that we were in and that we would have to get this equipment at once if we should need it. I did not order it at that time. I just came over to see if I could get it or not, and returned home, and I wrote Fairbanks, Morse & Co. canceling the contract and I notified Eck Baughn that he could proceed to get the machinery

(Testimony of Levi Austin.)

for us. I wrote him at Yakima April 2d, he probably got it the 4th or 5th of April. We got an 8" pump and managed to rent an old motor there in the community, 15 H. P. motor with head on. It was greatly overloaded but answered the purpose. It was delivered right away, in probably a week or ten days. We did not proceed to immediately install it because Fairbanks, Morse & Co.'s agent was out right after we wrote to them telling them we rescinded the contract and they sent a man out the 2d of April and he told us he would probably be able to get our equipment and wanted to know what we were doing, he would either phone us or telegraph us, and [47] we waited those two days, we didn't promise him to do that, we didn't depend on them. That occasioned several days delay. We installed the pumping plant as quick as we could get it on the place. After we got the pump I think it took us ten days to install the pump. We had to get the motor and we had to have parts made to fit the motor, direct motor to the pump, and we had to have the base arranged and other parts which occasioned more or less loss of time. We worked on the installation with assistance from the time received until installed and had it completed about the 15th day of May. We started operating it the 20th of May. At this time the alfalfa on the thirty-five acres of the old seeding was all dried out, it was all yellow and powdery. It all looked the same on the upper and lower ground. We started irrigating the new

(Testimony of Levi Austin.)

land first, we knew the seeding died before we started to irrigate the new land, first on the low land. It takes about two weeks on the lower land. We got that wet and then we found that some of the new seeding was killed, so we immediately reseeded that before turning the water on the hill because the ground was already wet. That caused us two or three days' delay getting on the upper land. It takes about two weeks on the upper land and about four weeks to get over the entire place. We had between fifty and sixty acres in cultivation at that time which we irrigated. We had seeded about 15 acres additional land in the fall of 1919. In the spring of 1920 our total acreage in cultivation was between fifty and sixty acres. The water ran continuously on to this land during the entire irrigation season after we got started.

From the thirty-five acres in the season of 1920 we got about twenty acres of hay. Our average, I think, for previous years on the 35 acres had been about five tons. We had not had ample irrigation for that land. That was one reason we were making [48] the change. Between six to ten tons to the acre is about the average yield in that country. We raised only 20 tons on the 35 acres. On the lower tract near the river we raised about 60 tons. That was about 25 acres, between 25 and 30. From 6 to 8 tons is the ordinary average yield of that land if properly irrigated. The effect of soil in that part of the country if the irrigation of it is delayed from April 1st to May 15th or 20th

(Testimony of Levi Austin.)

is to kill part of the roots, to weaken the stand of alfalfa and to destroy the first cutting. Standing alfalfa for the entire season it does not kill, but on some ground, take gravelly soil, that bakes; it will kill alfalfa on that. The effect on that alfalfa for lack of irrigation in 1920 was about seven acres of the new seeding was killed, when we irrigated it the new alfalfa did not come up at all, of course, and when we irrigated the lower land first, when we got on the high land on the other 25 acre place it was up in June and that land was gravel and had poorer soil than down below. This land of ours is adjacent to the Columbia River, it is practically a quarter of a mile from the low water line. We didn't get any first cutting at all in 1920, had a stand there so we only got a part of a crop. We got about 20 tons of hay from the 35 acres on the old seeding. We got between 50 and 65 off of but 18 acres. The effect of lack of water on the roots of the alfalfa grown on the 35 acres was that it killed a great many of the roots, it thinned the stand while we were irrigating in 1920, the first cutting came up scraggly and we only cut it twice, the second cutting was all grass and weeds, well, practically worthless. We ploughed about 15 acres since and left about 12 acres go entirely. We irrigated 10 acres this year. The alfalfa roots on this 25 acres were destroyed to such an extent as to make it unprofitable without reseeding. When you count [49] the cost of irrigation you cannot afford to irrigate on that



(Testimony of Levi Austin.)

kind of a stand. Practically  $\frac{2}{3}$  or  $\frac{3}{4}$  of the roots of the alfalfa were destroyed. We reseeded 12 acres. In 1919 about 35 acres was in good condition, as nice a stand as you could ask for. The roots were injured on the 7 acres, of course, the entire field was injured, so we did not get as much hay as we should have got. Of course that would leave about 18 acres that we irrigated first, began irrigating about the 15th of May, that was injured very little, we got two cuttings off it. There was 42 acres with injured roots. We would have got at least 5 tons to the acre on the new seeding that was a year old had water been supplied on April 1st, 1920, and during the irrigation season of that year upon our 60 acres. We got 20 tons off 35 acres. That would make about 155 tons less than we would have received if properly irrigated on 35 acres. From the remaining acres that water had been supplied the 1st of April and during the season of 1920 we would have got close to 100 tons on the field that was not killed, and on the other we cut about 20 tons. We would have cut about 250 tons more on this land in 1920 if we had begun irrigation in April and continued during the season than we did get. We estimate the amount we lost from lack of irrigation and of irrigation facilities from April first and during the season of 250 tons of alfalfa. We sell practically all our hay loose, but we were intending that year to bale our first and second cutting, because that was the year after the hard winter and the hay was cleaned

(Testimony of Levi Austin.)

up. We had calls and sold practically all our hay for \$18 and \$20; that would make \$14 less the cost of producing during 1920. It cost us about \$5 to produce it in 1920. It cost us about \$6 per ton to prepare a crop, baling and delivery and all. The cost of producing it in the stack would be about \$3. That includes [50] the cost of pumping and everything else. The market price of hay in 1920 was about \$24 per ton. I do not know that \$6 would be correct for producing it and delivery on the cars that year, because we had to pay more for labor, it would have cost us a great deal more than \$6, probably \$2 more, \$8.00. We have had no experience whatever with baling, we have not baled any of our hay. To reseed 42 acres of land in alfalfa would cost about \$25 an acre, \$7 an acre for ploughing in 1920 and I think we paid \$40 per hundred for alfalfa seed and we sowed 20 lbs. The spring tothing and leveling and ditching and the other works amounting to \$7 or \$8 more. It amounted to between \$20 and \$25 an acre. I am farming this section of land and raising alfalfa and know the value of land there, with and without alfalfa on it. Because of withholding water from April 1st until the middle of May on this 42 acres of land, it means it would have to be reseeded and that means the loss of the value of one year's crop, as you receive no return the first year. The whole amount of damage would be at least \$50 per acre for 43 acres.

(Testimony of Levi Austin.)

Mr. Powell, the traveling agent of the defendant, and Mr. Zane the local agent at Hanford, came to our ranch relative to buying this pumping plant. Mr. Powell's name appears on the contract, which is the first proposal we had. He was on or over our land prior to the execution of the contract and I went over the problem of irrigation with him.

Q. What was said to him relative to the purpose for which you wanted this plant?

Mr. THOMAS.—We object to this testimony on the ground that the contract speaks for itself, and merges all prior contemporaneous agreements all merged in the written contract.

[51] The COURT.—My understanding is you can always show execution of the written contract and it is not to bar you proving that fact.

Objection overruled, answer the question.

A. Yes, we went into details of the plant, that it was not satisfactory for even the acreage we had in then and we wanted to put in more acreage and we went into details as to the different lifts and the amount of water required and he proposed this 25-horsepower outfit connected to an 8" pump would be exactly what we would want for this condition and the amount of water.

Q. Did the agent go with you over this land at the time you had this conversation? A. Yes.

Q. Did you or did you not make known to the agent of the defendant the full purpose?

Mr. THOMAS.—Objected to as the question is leading.

(Testimony of Levi Austin.)

The COURT.—You can ask him what the agent said in regard to it.

A. Yes, we told him our problem there for irrigation and at this time the outfit we had there was not satisfactory, we were not getting enough water and we told him that we must make a change of some kind and asked what he would recommend to fit our purpose and he proposed that we take at least a 25-horsepower engine and connect it to this 8" pump and later on if we cared to put in a larger pump this 25-horsepower outfit would furnish the power. We told him at that time it would be necessary to have the outfit delivered in time account of the water in the spring, well he assured us if we would place our order at that time there would be no question about the delivery of the machinery.

[52] Q. Was anything said further by you as to the time necessary for the delivery?

A. Nothing further that would be delivered about the first of December.

Q. Why was it to be delivered by the first of December?

A. Well, he had to install the engine and machinery there and it takes more or less time, we thought we would install that during the winter so in our busy season we would have it ready for irrigation next year.

Q. Was anything said by the agent as to the time the land there should be irrigated there that season?



(Testimony of Levi Austin.)

The COURT.—What was said?

A. We discussed that point and it was understood we were to begin irrigation about the first of April. In going into the contract for the machinery to be delivered the 8th of December it would give us plenty of time to have the outfit installed and begin pumping by the first of April, that was understood between us and the agent.

Q. Did you fix any definite date on which you were to have this pumping plant in operation to irrigate your property for 1920? A. Yes.

Q. What was the date fixed?

A. April the first.

On cross-examination, LEVI AUSTIN testified as follows:

My occupation is farming. I teach school at present. I began teaching in September. I had taught before last September, I have taught four years altogether. I have been engaged from the time I was eight or nine years old until sixteen and then from 1917 until 1921 in alfalfa raising. Up to the time I was sixteen I raised alfalfa in Nebraska, Keith County. We raised [53] alfalfa there partly by irrigation.

Under lease we have the North  $\frac{1}{2}$  of the Northwest  $\frac{1}{4}$ —80 acres. Between that and the river there is a tract of land that is in alfalfa. It was owned by Wagner, possibly 10 or 12 acres that is in alfalfa. We have irrigated part of this leased land from a well on Mr. Wagner's place. Mr.

(Testimony of Levi Austin.)

Wagner was interested with us in the alfalfa on the school land. I think our arrangement with him was terminated some time in March, 1920. Wagner was irrigating about 10 acres of alfalfa from that well; that well came in about the first of May of each year. When he got the water on there May first I think he raised three crops every year. The year we irrigated that alfalfa on the leased land I do not think we got water on there before May first of 1919, we raised three crops that year. We raised three crops on a part of 35 acres above here that year, also with water obtained on May 1st.

We have about 20 tons of hay left from 1920. The winter of 1920 was an open one, a mild winter. Our market for hay up in that country is from the sheep men and farmers around there. I could say that after April 4th we did not intend to put in a gas engine at all.

On redirect examination, Mr. LEVI AUSTIN testified as follows:

Q. You had not at the time you talked to Mr. Zane, the agent of the defendant here, cancelled your contract with the company?

A. No, not at any time.

Q. Who was Zane?

A. He was the local agent of Fairbanks, Morse & Co. at Hanford.

Q. Where did he reside? A. Hanford.

Q. How long had he been there?

[54] A. Five or six years.

(Testimony of Levi Austin.)

Q. Had he been engaged as agent selling engines, etc. of the Fairbanks, Morse & Co. for a number of years in that country?      A. Yes.

Mr. THOMAS.—I object to this line of testimony so far as proving agency is concerned as immaterial and incompetent.

A. That was his statement and Mr. Powell's statement that he had taken the agency.

The COURT.—He says Mr. Powell made some statement, Mr. Powell is admitted as agent.

Mr. WAGER.—If he was selling this equipment, the same kind for this defendant in that country for a number of years, I think that establishes agency.

Letters marked Defendant's Exhibits 1 and 2, and Plaintiff's Exhibit "C" were admitted in evidence in the examination of said witness.

### **Testimony of Jay Austin, for Plaintiffs.**

JAY AUSTIN, produced as a witness on behalf of the plaintiffs, having been duly sworn, on direct examination testified as follows:

I am a member of the partnership of Austin Bros., and reside upon the land mentioned in the complaint here in 1919 and 1920. We still own it. I am the owner now of the entire tract, with my brother,—25 acres of upland and between 15 and 20 acres of the lower flat were in alfalfa in the fall of 1919, when we entered into the contract. It had been previously seeded to alfalfa. In the early spring of 1920 before the moisture

(Testimony of Jay Austin.)

left the ground it was in good shape. The first water we got on [55] this tract of alfalfa was May 20, 1920. That was on the lower tract. The first water we got up above was a good deal after the first of June. From between 55 and 60 acres of this land we got about 89 tons of hay in the season of 1920. If the land had been irrigated properly from April 1st, we should have got somewhere around 335 tons of hay.

Q. Suppose that the defendant here had complied with their contract and furnished you the equipment which you contracted to buy from them so it could have been installed by April 1st, and in fact how much would you have reasonably raised from that tract in 1920?

Mr. THOMAS.—This testimony in regard to loss of crops all goes in over our objection.

The COURT.—Yes.

Upon cross-examination, JAY AUSTIN testified as follows:

My occupation is farming; besides farming I teach school. I have been farming in the State of Washington for five years. I have had some experience raising alfalfa in Nebraska. During the years 1916, 1917 and 1918, the year 1918 is the only year we got water from the well on the North side of the 40-acre tract prior to the 1st day of May. The usual time we began irrigation from that well was the 1st of May. We did not have water in that well sufficient to irrigate be-



(Testimony of Jay Austin.)

fore that time. That well just came in year by year with the exception of the year 1918 along about the first of May. Every year that water was out on there the 1st day of May we raised three crops on the land. None of the hay was damaged during those years. It came out all right. We took a lease upon that 80 acres in 1917; during the year 1918 we broke some of it and put it in alfalfa. In 1918 [56] we got our water for this leased land from a well on Wagner's place. After he finished his irrigation we started irrigating on the leased land; that was some time during July. Wagner had irrigated his tract before that time. His well usually came in about a month later than the other well; his well was about a month behind. He watered his ten, twelve or thirteen acres, whatever he had from this well and started some time between the middle of May and the first of June. He got two crops,—I don't know whether you would call the other a crop or not,—he cut three times. I could not give you the exact date we began to irrigate, around the first of May. The two tracts we irrigated was a tract of alfalfa on the leased land and the Wagner tract. Wagner had an interest in 1918 in the leased land and in the pump, and subsequent, prior to the opening of the season 1919.

With the equipment we now have we can irrigate the Wagner tract together with our hay land and the leased land. If we had had the equip-

(Testimony of Jay Austin.)

ment installed by May 1st, 1920, we would have been able to raise the same amount of crops practically that were raised in 1917, 1918 and 1919 on that land, by getting water on there the 1st of May.

Upon redirect examination, JAY AUSTIN testified as follows:

We have the same method of pump in 1921 that we had in 1920. Before we entered into this contract we did not get water on this land on the old system earlier than the 1st of May because the well on the North 40 was not deep enough. The water came in around the 1st of May. Our old pumping plant was not sufficient to irrigate the land we then had in cultivation. That cut us off of one cutting. We got three cuttings when we should have got four.

[57] **Testimony of Mrs. Remlinger, for Plaintiffs.**

Mrs. REMLINGER, produced as a witness on behalf of the plaintiffs, after being duly sworn, on direct examination, testified as follows:

My name is Mrs. Remlinger and my postoffice is Allard; we live about a mile from there and about 2½ miles from the Austin ranch. We have lived there five years ago to-day. I am familiar with the land of the plaintiffs and was there in the summer of 1919, I was up there then. The condition of the alfalfa was splendid. I saw it again in April, 1920; it was in splendid shape. Along about the middle, or between the 10th and

(Testimony of Mrs. Remlinger.)

20th of May I saw it. It was bad, it was flat, and dried down. I saw it after the 1st of June that summer and the whole field was getting awfully grassy. The alfalfa was thin and scant. The season of 1920 in our section was real dry and hot; it is always awfully hot.

Upon cross-examination, Mrs. REMLINGER testified as follows:

It was the 16th day of April, 1920 that I saw the land the first time. The young alfalfa was coming up fine; if it had gotten water soon after that it needed it right away; on or about the 20th of April would be all right. It looked nice and green. It looked bad in May when I saw it somewhere between the 10th and 20th.

Upon redirect examination, Mrs. REMLINGER testified as follows:

They turned the big pumping plant at Grotti irrigation the first of April.

[58] **Testimony of Herbert Arrowsmith, for Plaintiffs.**

HERBERT ARROWSMITH, produced as a witness on behalf of the plaintiffs, after being duly sworn, on direct examination testified as follows:

I know the lands of Austin Bros. from 1913 to 1919. I live about 3½ miles above and across the river. When I left there in the fall of 1919, the last of August, Austin Bros. had a good stand of alfalfa there. I was there the last of May or

(Testimony of Herbert Arrowsmith.)

the first of June, 1920, the alfalfa was all dry; the top 35 acres was so badly spotted it would not pay to irrigate it. It had died out in spots. When I was there in June they were reseeding seven acres that had died out.

### **Testimony of Eck Baughn, for Plaintiffs.**

ECK BAUGHN, produced as a witness on behalf of the plaintiffs, after being duly sworn, testified upon direct examination as follows:

I live in Yakima and am an irrigation or electrical engineer. I have been an electrical engineer for fifteen years and an irrigation engineer for eleven years. I have lived in Yakima for eleven years.

I know the land owned by plaintiffs. I have been over and across these lands at various times. I am familiar with the soil conditions on these lands. They are composed of what we know as Ephrata fine soil, mixed with gravel, with emphasis on the gravel. There is a difference in the amount of water necessary for such as that and land situated in the Yakima valley. Four times as much water as is needed in the Yakima valley is needed on the soil of the Austin place. On the pumping plant we figure the Yakima valley twice what we have for gravity and on the Columbia river we double up on that. [59] I saw these lands in the fall or summer of 1919. The stand of alfalfa was what I would consider good for the Columbia river. I saw it again in April and May,



(Testimony of Eck Baughn.)

1920; the alfalfa looked awful dry to me. I saw it about the 5th or 6th of June; it was drier on the hill, that is, on the 35-acre tract; the other was wet and coming up in pretty good shape. I saw it again in the fall; it was so dry I could not tell much of the condition of the plant life. I saw it again in the spring of 1921; there was not much alfalfa there, a part had been ploughed up and part of it scattered, sheep running on it. There was not sufficient alfalfa on this 35 acres to justify the irrigation of it.

Upon cross-examination, Mr. BAUGHN testified as follows:

My firm is a competitor of Fairbanks, Morse & Co. in the sale of pumps and getting the business. Up in the district where Austin Bros.' property is situated, four times the Yakima Government allowance of water is required to irrigate profitably on account of the soil up there.

**[60] Testimony of C. R. Miller, for Defendant.**

C. R. MILLER, produced as a witness for the defendant, after being duly sworn, on direct examination, testified as follows:

My name is C. R. Miller, I am the local manager of Fairbanks, Morse & Co. at the Seattle office. I am the C. R. Miller whose name appears on this contract with Austin Bros. for the sale of this equipment. After this equipment was ordered by Austin Bros. from Fairbanks, Morse &

(Testimony of C. R. Miller.)

Co. we placed the order with our factory and made endeavor to get delivery made as quickly as possible by telegraph. There was a shortage of raw material of every kind, and shortage of labor. I think every manufacturer was behind with his work at that time; anyway, we had great difficulty in procuring material and making these engines and pumps.

Mr. Powell, the salesman in this case, is not with us at the present time. I do not know where he is. He did not at any time inform us as to the conditions at the Austin place, where this pump was to be located.

One of the Austin Bros. called at our place some time in the latter part of December, 1920. I do not remember whether it was the 28th, 29th or 30th. It was Levi Austin. Mr. Austin wanted to know if the engine he had ordered was the latest type and he wanted some information about the construction of it and I personally showed him another engine exactly like it and gave him the information wanted. He looked at the engine and was apparently satisfied with it. He said nothing else to me at that time, other than he was interested in a larger sized engine which he expected to buy the following year or late that season. Nothing was said about delivery of the equipment at that time that I recollect. Mr. McIntosh, of our firm, has [61] been looking after the details of this transaction. I know Mr. Zane, at Hanford. He is what we call a dealer, or what

(Testimony of C. R. Miller.)

we call Z engine dealer, he sells the small type Z engine, 1½, 3 and 6 horsepower sizes. He buys the engine outright from Fairbanks, Morse & Co. and resells them. That is about all there is to the transaction. We make arrangements with him that he can buy these engines at what we call dealers' price. A 6-horsepower is the largest engine he buys from us on those terms. Besides the 6-horsepower, he buys the 1½ to 3 and 6. Above the 6-horsepower we sell directly throughout the country through our salesmen.

Q. Assuming that Austin Bros. had accepted the proposition from Fairbanks, Morse & Co. for delivery of the 25-horsepower engine during the month of April, 1920, with the four-inch temporary pump, will you state how long it would take to install that in concrete?

Mr. WAGER.—I object to that, it does not show that he knows where this land is located, he has never been on it or knows how long to deliver there and conditions surrounding it.

The COURT.—He asked delivery to their place.

A. Well, it should without any outside force interfering should not take over two weeks to erect a foundation, block of concrete and mount the engine.

Upon cross-examination, Mr. MILLER testified as follows:

Fairbanks, Morse & Co's principal office is in Chicago. I am the agent in Seattle in charge. I

(Testimony of C. R. Miller.)

have been in the employ of Fairbanks, Morse & Co. seventeen years. I have never been on the land of the plaintiffs herein. I do not know, about how [62] long it would take to haul this engine, boiler and pump from the station on the Milwaukee to their well, where it would have to be installed. I know nothing of the condition of the country.

**Testimony of W. J. McIntosh, for Defendant.**

W. J. McINTOSH, produced as a witness for the defendant, after being duly sworn, upon direct examination testified as follows:

My full name is W. J. McIntosh. I am an engineer. I have been engaged as engineer for Fairbanks, Morse & Co. about four years. Prior to that time I had about twelve years' experience. I followed mechanical and electrical engineering. I have had a common school education, two years in an engineering college besides studying when I was working. For five years I was chief operator of the plants of the Pacific Gas & Electric Co. in Arizona and California, and for three years I was manager of the Western Machine Company in Southern Arizona, the balance of the time I have been in irrigation and mining work. During all the time I was in Arizona I was connected with irrigation business. I have had about four years' experience in irrigation lines in the state of Washington. I am familiar with this case, I am the employee of Fairbanks, Morse & Co. who



(Testimony of W. J. McIntosh.)

has the most to do with this matter. I have conducted the correspondence and negotiations since about April 1st, 1920. That is the time I got into the case. I was in Hanford about April 1st or April 2d, 1920. I spoke to one of the plaintiffs over the telephone at Hanford on April 2, 1920.

We had received a telegram from our factory stating the machinery would be shipped April the 7th, and I told Mr. Austin of this fact and he asked me about how long it would take to get it there if shipped, and I told him about three weeks and he [63] said that would not be time enough, he said he was making arrangements for an electric plant and he was going to try to get a fifteen-horsepower motor and I told him I thought we could do something for him and for him to wait a few days and just as soon as I could I would let him know if we could do anything for him in the way of direct connected outfit and he said all right.

I wrote Austin Bros. on April 9th (Defendant's Exhibit "2"); in reply to that letter I received the letter of April 16th (also Defendant's Exhibit "2"). After I returned to Seattle I wired to several manufacturers and also to our Pacific Coast branches, in an effort to obtain equipment for direct connection, an electric pump and motor; the best I could do was thirty days' shipment. I next offered Austin Bros. a 25-horsepower engine, as they contracted for, and a temporary four-inch pump. The four-inch pump and the engine were

(Testimony of W. J. McIntosh.)

new and both were in stock at our place of business in Seattle. These negotiations were all carried on by correspondence.

Q. If you had received a wire from Austin Bros. on the 14th of April, 1920, in response to your letter of the 9th to ship the temporary equipment, that is, permanent engine and temporary pump, how long would it have taken your company to install that in the well of Austin Bros.?

Mr. WAGER.—We object to that; he does not know anything about the nature of the country, never has been there and does not know conditions as to installation.

Upon cross-examination, Mr. McINTOSH testified as follows:

We had a 25-horsepower engine at our place in Seattle, we had it there all during the winter. It was of the same character as we were selling him; I mentioned this engine in my letter [64] of April 9th; that is the first mention I ever made. The first time I was on the land, I think, was about October, 1920,—I cannot tell the exact time. The new well was dug at that time. I saw it.

### **Testimony of H. W. Lemke, for Defendant.**

H. W. LEMKE, produced as a witness on behalf of the defendant, in direct examination, testified as follows:

My name is H. W. Lemke. I live at Yakima. I own alfalfa land in Benton County. I have

(Testimony of H. W. Lemke.)

one ranch twelve miles from Austin Bros. place and the other about seven. I raised alfalfa in 1919 and 1920. I raised quite a little in 1920. I have 160 acres on both places. I raised about 400 tons of hay in 1920; I was not able to dispose of it during the summer, fall or winter of 1920—could not find any market for it and I sold 20 tons for \$12.00 in the stack. All the hay I had in White Bluffs in 1920 was carried over and all I had in Cold Creek was carried over, and I still have it. For market we depend usually on the sheep men and 1920 was a very open season, mild winter,—we had no demand at all. The White Bluffs market is usually local, some hay shipped out; not much shipped out in 1920. I don't know of anyone else that got more than \$12.00 per ton for hay in 1920. I think that is the top price, to my knowledge, in the stack.

Upon cross-examination, Mr. LEMKKE testified as follows:

I know the Diamond D. Ranch, owned by Dam Bros. I judge it is sixteen miles, it may be more, from the land of the plaintiffs—it may be only nine, I don't know. I think we raised somewhere around eight hundred or nine hundred tons of hay in 1920. I never heard of their selling it to the sheep men at Ellensburg, in 1920, for \$17.00 per ton. I was not fortunate enough [65] to find a market for first and second cuttings of alfalfa in 1920. I never heard that if I baled it I could

(Testimony of H. W. Lemke.)

have shipped to market for \$26.00; the average market price of baled hay in the city was \$12.00; there did not seem to be any difference between the cuttings; hay was not sold anywhere from \$22 to \$26 for the first cutting of alfalfa in 1920, to my knowledge.

**Testimony of L. A. Safford, for Defendant.**

L. A. SAFFORD, produced as a witness on behalf of the defendant, after being sworn, on direct examination, testified as follows:

My name is L. A. Safford. I live at Kennewick, Washington, and am district manager of the Columbia District for the Pacific Power & Light Company. I have been with them eleven years, in the irrigation districts since 1914 and in Kennewick since the fall of 1919. I know the Austin Bros. ranch, have been over it. All my knowledge of it has been since the winter of 1920 and 1921. Austin Bros. made application to our Company for power in the spring of 1920; they had their line finished and ready for power about May 15th. We got it connected about three days later. We agreed to furnish the power provided they made arrangements with Von Herberg to secure the use of his line. If Austin Bros. had got permission from Von Herberg to use his private line we could have given them power the first of April, 1920. We turned the power on their land about the 18th of May, 1920. I think that was the date; I do not think they were quite ready to use the power.



(Testimony of J. C. Lockett.)

Upon cross-examination, Mr. SAFFORD testified as follows:

Austin Bros. constructed this line themselves.

**[66] Testimony of J. C. Lockett, for Defendant.**

J. C. LOCKETT, produced as a witness on behalf of the defendant, after being duly sworn, testified as follows:

My name is J. C. Lockett. I live at Toppenish. I run a machine-shop there, installation and pumping equipment. I have been there about fourteen years and I sell pumps. I had two, three, four, one six and one eight" pumps in stock during the month of May, 1920. I know nothing about the amount of water required in the Hanford country. I am not familiar with that country.

Upon cross-examination, Mr. LOCKETT testified as follows:

I handle Fairbanks, Morse stuff in Toppenish along with other stuff.

**Testimony of R. W. Judd, for Defendant.**

R. W. JUDD, produced as a witness on behalf of the defendant, on direct examination, testified as follows:

I live at White Bluffs, I have lived there since October, 1909. My occupation is farming, at the present time; I have thirty acres; raise alfalfa, corn and potatoes. I have raised alfalfa since 1913; in the spring of 1913 my three brothers and I started a ranch in the Columbia River, that

(Testimony of R. W. Judd.)

property is now Austin Bros. We made the sales contract to the Austins on March 24, 1916, and they took possession on May 1st, 1916. We irrigated the tract of alfalfa on that forty from a well located about the North edge of it. I do not know how long that well had been dug prior to 1916; it had been there a good many years previous to that. We used that well all the time. We had splendid well water in 1913, the first year we were [67] there, we did not attempt to use it very freely; the next two years used it and got water along about the 20th of April until the 1st of May. We started seeding in 1913; we started the water along about the 21st or 22d of April in 1914; we got three crops off that alfalfa that had been seeded the year before, we got about five tons per acre. It was a good crop for the second year of alfalfa. In 1915 we got the water on about the same time, along some time after the 20th of April. The water did not come up high enough in the well to reach it with a suction pump we had there earlier. I would say we got 300 to 400 gallons per minute from the three-inch pump and 20-horsepower engine. We left the pump on the place for Austins when we sold. We moved off May 3, 1916. I think the water had been turned on three or four days when we left. I started in about the last of April or the first of May. There had been about six acres of the place watered when they took possession.

(Testimony of R. W. Judd.)

In 1915 I think we cut about 120 tons of hay off about 32 acres.

It costs about \$6.00 per ton to put the hay in the stack; this includes the cultivating, irrigating and harvesting. The market value of hay in the section from Austin Bros.' place up to White Bluffs during the fall and winter of 1920 was about \$12.00 per ton. I bought some for \$10.00 from Fred Wile, about twelve miles from the Austin place; I didn't have any hay to sell; some years hay is shipped out of that country; depends on the local market, most of them depend on the sheepmen to buy it. My experience has not shown that if water is not placed upon alfalfa during the first month of the season, or the first month and twenty days of the irrigating season, that the alfalfa roots will suffer any permanent injury. I have been raising [68] alfalfa for eight years; I have observed alfalfa where it has been deprived of water for a month and a half or two months, at the beginning of the season, in that part of the country in which the Austin Bros. are situated. I would not consider it permanently injured from what I have seen there. The second crop would not be as good; the third would be just about as good as ordinary. If they had water again in the spring following it would not be materially damaged; it is pretty hard to kill alfalfa.

(Testimony of R. W. Judd.)

Upon cross-examination, Mr. JUDD testified as follows:

The old well started seeping along about the first of April.

Upon redirect examination, Mr. JUDD testified as follows:

Quite a bit of hay was unsold in 1920 and is still there.

### **Testimony of E. D. Wagner, for Defendant.**

E. D. WAGNER, produced as a witness for defendant, upon direct examination, testified as follows:

My name is E. D. Wagner and I live at Yakima; before coming to Yakima I lived in White Bluffs and vicinity. I had land adjoining that tract of Austin Bros. Before coming to Yakima I lived there between six and seven years. I moved on there in 1913 and lived on there until the middle of April, 1920. I had 30 acres of land, 12 or 13 in alfalfa. I got water on my alfalfa about the 20th of May from an individual pumping plant in the well on my place. I irrigated my land only with a 3½" pump, during the years I was there I got water along about the 20th of May; We got no water on the land at all prior to the 20th of May when I was there. The water would not come in the well, it was a late well. I started to irrigate about the 20th of May of each year. I cut three crops. From 1913 to 1917 the [69]



(Testimony of E. D. Wagner.)

alfalfa raised on that land averaged about five tons to the acre. I cannot say that it was damaged very much by reason of not getting water on there before May 20th; it was damaged some; I cannot say that there was permanent injury at any time. Later, I installed another pump in that well, a 5" pump with a 15-horsepower engine. In that pump and engine and well Austin Bros. were interested with me. This new pump was put in in the early spring of 1919. From the 5" pump and 15-horsepower engine we watered the state land South of my place,—school land. I had an interest in that with Austins, we were jointly interested in the land in the year 1919; Austin Bros. also had an interest in the pump and engine. I should judge we watered about 15 acres of the school land in 1919. I cannot say that there was any more during the year 1920. I left there in April 1920. I assisted in planting or seeding the alfalfa. I think we put ours in in July, 1919. I had an interest in the alfalfa on the school land just one season, 1918. The pump and engine after 1919 was moved over on the school land and installed on the school land in the new well. The pump and engine that was on my place, the one I had an interest in, was in there in April, 1920. In 1916, 1917 and 1918 the well came in so we could pump water on the north side anywhere from the 15th of April to the first of May. I cannot remember that it was ever as late as the first of May, I do not think it was ever earlier than the 15th of April.

(Testimony of E. D. Wagner.)

The winter of 1920 was a mild winter.

Upon cross-examination, Mr. WAGNER testified as follows:

I had no connection whatever with the irrigation of Austin Bros.' land in 1919; it was in 1918 that I was connected with them. My land was right close to the river, between Austin [70] Bros.' land and the river. The average lift of pump was about 25 feet, high water would be about 18 feet. I do not think the river has anything to do with the moisture. It was much lower than the land of Austin Bros. on the hill. It was nearer the river than Austin Bros., except the school land was about the same level; mine was in between the school land and the river. This oil pump was in the well in 1920. I was not there in April, 1920, I am positive of that.

**Testimony of Jay Austin for Plaintiffs (Recalled in Rebuttal).**

JAY AUSTIN, recalled on behalf of the plaintiffs, testified as follows:

There was no pump or engine on our place in our well in 1920, we sold that engine and delivered it some time in March.

[71] Mr. CAMPBELL.—We move the Court to withdraw from the consideration of the jury the question of the damages, if any, sustained by plaintiffs on account of the loss of crops during the year 1920, or permanent injury to the alfalfa, on the ground and for the reason that such damages,

if any, are too remote, speculative, and not within the minds or contemplation of the parties at the time the contract was entered into, and there can be no recovery therefor.

The COURT.—I will deny the motion to withdraw the question of damages for loss of crops and permanent injury to the alfalfa from the consideration of the jury, but will compromise with you by submitting a special finding to the jury, asking how much, if any, of the damages thus found or allowed is for loss of crops and for injury to the growing crops, and if they find against you let them find for the amount of damages sustained by reason of loss of crops and injury to the growing crops. You can then file a motion for a judgment upon the verdict for general damages and the plaintiffs can file a motion for judgment upon the verdict for general and special damages. You are apparently prepared on this question and it comes as a surprise to the plaintiffs and they are not prepared on it and I have not had an opportunity to fully examine the authorities, but what authorities you have here would indicate that your motion should be granted. The plaintiffs may have ten days in which to submit their authorities, and you may have ten days to reply. If, upon examination of the authorities submitted, I find that the question of special damages for loss of crops and permanent injury to the alfalfa should not have been submitted to the jury, the verdict as to those items can be set aside,

if necessary, [72] without granting a new trial. At the time you move for judgment on the verdict for general damages and the plaintiffs move for judgment on the verdict for general and special damages, in the event a verdict is returned against you for both, feeling and believing as I do now, I will grant your motion.

Mr. CAMPBELL.—We except to that portion of the Court's ruling refusing to withdraw from the consideration of the jury the special damages for loss of crops and permanent injury to the alfalfa.

After the close of the testimony, the Court instructed the jury as follows:

#### **Instructions of Court to Jury.**

This is an action to recover damages for breach of a contract for the sale and delivery of a pumping plant. The execution of the contract is admitted, and it is also admitted there was a breach of the contract on the part of the defendant. In other words, the contract called for delivery of pumping plant on or before Dec. 1, 1919, and it is admitted that it was not delivered or tendered until subsequent to March 30, 1920. The only questions before you, therefore, relate to the measure of damages. The items of damages claimed are four in number. The first item is for the return of the \$200.00 paid at the time of the execution of the contract. The second item claimed is the cost of installation of a temporary plant to supply water after breach of the contract set



forth in the complaint. The third item is for loss of crops during 1919 and the fourth is for permanent injury to the alfalfa growing on the land. The first item of two hundred dollars under the contract, plaintiffs, as a matter of course, is entitled to recover with legal interest from the 30th day of March, 1920. Conceding that the contract was breached by the defendant, as [73] claimed, as said by the Supreme Court of the United States:

“Where a party entitled to the benefit of a contract can save himself from loss arising from breach of it at a trivial expense or with reasonable exertion, it is his duty to do it and he can charge the delinquent with such damage only as with reasonable endeavors and expense he could not have prevented.”

In other words, if you find the contract was breached by the defendant, and I charge you it was so breached, it then became the duty of the plaintiffs to make reasonable exertion to mitigate the damages. If they have failed in this they cannot recover. If they did exercise reasonable care to avoid damages they are entitled to recover whatever damages they suffered in so doing. They are not entitled to recover the expense of installing their plant, however, because that is not the true measure of damages. They could not retain the plant and recover the entire cost of installation. The measure of damages is the difference between the actual value of the plant at the expiration of such time as the plaintiffs should have installed the plant called for by the contract, or some other

plant to serve the same purpose and the cost and expense of installation. The third and fourth items relate to the loss of crops and injury to the crops or land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration. The plaintiffs are entitled to recover these items if you find from the testimony that the breach of the contract was the proximate cause of the loss or damage. The Supreme Court of the United States has defined proximate cause as follows:

“It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as the oft cited case of the squib thrown in the market place. *Scott vs. Sheppard* (Squib case) 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous [74] operation. Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application, but it is generally held that in order

to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances.”

If you find that the plaintiffs suffered damages by reason of the loss of crops or injury to crops, and that the breach of the contract was the proximate cause of the resulting damages then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the value of the alfalfa which they actually cut and harvested and the net value of what they would have harvested had the contract been fulfilled. Of course to determine the net value you must make deductions for all expense incurred in growing and harvesting the crop. The other item is based on the same ground. If you find that the alfalfa land was injured, that the growing alfalfa was injured, and that such injury resulted directly or proximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in this regard.

You, Gentlemen of the Jury, are the sole judges of the facts in this case and of the credibility of the witnesses. Before reaching a verdict, you will carefully consider and compare all the testimony; you will observe the demeanor of the witnesses upon the stand; their interest in the result of your verdict, if any such interest is disclosed;

their knowledge of the facts in relation to which they have testified; their opportunity for hearing, seeing or knowing these facts; their bias or prejudice and all the facts and circumstances given in evidence or surrounding the witnesses at the trial. I further charge you, [75] that if you find from the testimony that any witness has wilfully testified falsely to a material fact you may disregard the testimony of such witness entirely except in 'so far as he is corroborated by other credible testimony, or by other known facts in the case.

The burden of proof is upon the plaintiffs in this case to establish their claim by a preponderance of the testimony. A preponderance of the testimony does not necessarily mean the greater number of witnesses, but rather the convincing force of the testimony as against the testimony offered by the opposing party.

Your verdict, of course, must be based on the evidence and not upon mere conjecture or guess work. There is some question in this case whether the parties are entitled to recover for loss of crops, or injury to crops, but that is a question of law for the consideration of the Court, and I have therefore submitted to you a general verdict in favor of the plaintiffs, and also the following special verdict, or finding."

To that part of the Court's instructions to the jury relative to approximate cause, not quoted from the United States decision, reading as follows:



“The third and fourth items relate to the loss of crops and injury to the crops or land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration. The plaintiffs are entitled to recover these items if you find from the testimony that the breach of the contract was the proximate cause of the loss or damage.” . . .

“If you find that the plaintiffs suffered damaged by reason of the loss of crops or injury to crops, and that the breach of the contract was the proximate cause of the resulting damages, then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the value of the alfalfa which they actually cut and harvested and the net value of what they would have harvested had the contract been fulfilled. Of course, to determine the net value you must make deductions for all expenses incurred in growing and harvesting the crop. The other item is based on [76] the same ground. If you find that the alfalfa land was injured, that the growing alfalfa was injured, and that such injury resulted directly or approximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in this regard”;

the defendant then and there excepted, which exception was by the Court allowed.

The jury then retired and after a short absence returned into court with a verdict in favor of the plaintiffs for general and special damages in the sum of \$3088.00, accompanied by the following special finding:

Question: How much, if any, of the damages thus found or allowed is for the loss of crops and for injury to the growing crops?

Answer: Loss of hay, \$1,674, permanent injury to crops, \$840.

This verdict was returned on the 12th day of October, 1921. Thereafter the plaintiffs moved for judgment on the verdict of the jury in their favor and against the defendant in the sum of \$3,088.00, and defendant moved for judgment on the verdict of the jury in favor of the plaintiffs and against the defendant for the sum of \$574.00, and for no other or greater sum, together with costs to be taxed by the clerk.

Thereafter and on or about the — day of April, 1922, the motion of the plaintiffs for judgment on the general verdict was granted and the motion on the part of the defendant was denied. On the 17th day of April, 1922, the Court made and signed its judgment on the verdict of the jury, to which judgment on the verdict of the jury defendant excepted, and its exception was allowed.

And now, in furtherance of justice, and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and

prays that the same may be settled, allowed, signed and certified by the trial Judge as provided by law.

J. D. CAMPBELL,  
VAN DYKE & THOMAS,  
Attorneys for Defendant.

[77] Filed in the U. S. District Court, Eastern District of Washington. May 26, 1922. Alan G. Paine, Clerk. Edwd. E. Cleaver, Deputy.

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[78] In the District Court of the United States for the Eastern District of Washington, Southern Division.

LEVI F. AUSTIN and J. R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS, HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendants.

**Motion for Judgment on the Verdict.**

Come now the plaintiffs, appearing by their attorneys, E. E. Wager and J. C. Lloyd, and move the Court to enter judgment on the verdict of the jury in the above-entitled cause, in favor of the plaintiffs and against the defendants for the sum of Three Thousand and Eighty-eight (\$3088.00)

Dollars, and which amount is based upon the following special findings of the jury.

For loss of and damage to the hay crop of the year 1920 upon the premises described in the complaint .....	\$1674.00
For damage to and destruction of the alfalfa plant and the roots thereof on said land during said year .....	840.00
For partial cost of temporary transmission power line built to mitigate damages and the hydro-electric power used during irrigation season 1920 ..	350.00
For cash advanced by plaintiffs under contract and the interest thereon .....	224.00
And for plaintiffs costs and disbursements to be taxed.	

Dated this 12th day of October, 1921.

EUGENE E. WAGER and  
JAMES COLLINS LLOYD,  
Attorneys for Plaintiffs.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 12th, 1921.  
W. H. Hare, Clerk.



[79] In the District Court of the United States for the Eastern District of Washington, Southern Division.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-partners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS, HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

**Motion for Judgment on the Verdict.**

Comes now the defendant by its attorneys Van Dyke & Thomas and J. D. Campbell, and moves the Court to enter judgment on the verdict of the jury in favor of the plaintiffs and against the defendant for the sum of \$574.00, and for no other or greater amount, together with costs to be taxed by the Clerk.

Dated this 12th day of October, 1921.

VAN DYKE & THOMAS,

J. D. CAMPBELL,

Attorneys for Defendant.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 12th, 1921. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

[80] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-partners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN, and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.

**Memorandum.**

EUGENE E. WAGER and J. C. LLOYD, Attorneys for Plaintiffs.

J. D. CAMPBELL and VAN DYKE & THOMAS, Attorneys for Defendant.

RUDKIN, District Judge.

This was an action to recover damages for the breach of a contract for the sale and delivery of a pumping plant for irrigation purposes. The contract was entered into on the 25th day of September, 1919, and called for shipment or delivery on December 1st of the same year. The contract was never complied with on the part of the defendant. The plaintiffs claimed, among other items, dam-

ages for loss of crops during the season of 1920 and for permanent injury to the alfalfa growing upon the land. The defendant insisted throughout the trial and still insists that the latter items are too remote and speculative and that there can be no recovery therefor. The Court, however, submitted that question to the jury under appropriate instructions to which no exception was taken, and also submitted a special finding so that the objectionable items could be eliminated from the verdict if necessary without granting a new trial. The jury thereupon returned a general verdict in favor of the plaintiffs for the sum of \$3088.00, accompanied by the following special finding:

“Question: How much, if any, of the damages thus found or allowed is for loss of crops and for injury to growing crops?”

“Answer: Loss of hay, \$1674.00; permanent injury to crops, \$840.00.”

[81] The plaintiffs now moved for judgment on the general verdict, while the defendant moves for judgment in favor of the plaintiffs and against itself in the sum of \$574.00, being the amount of the general verdict less the two items complained of.

I have carefully considered the exhaustive briefs submitted by the respective parties and have examined the numerous authorities cited, as well as others, but any attempt to review the many apparently conflicting decisions would be of no avail. Suffice it to say that while the case is perhaps on the border line, I am not prepared to declare as a matter

of law that the jury was not warranted in finding that such damages were within the contemplation of the contracting parties at the time the contract was entered into and flowed directly and approximately from the breach complained of.

The motion of the plaintiffs for judgment on the general verdict is therefor granted, and interest will be allowed at the legal rate from the date of the verdict until the date of judgment, the interest to be computed up to that date and form a part of the judgment.

The motion on the part of defendant is denied.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. April 7th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver Deputy.

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[82] In the District Court of the United States  
for the Eastern District of Washington, —  
Division.

AUSTIN BROTHERS,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO.,

Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiffs and assess the damages in the sum



of Three Thousand and Eighty-eight and no/100  
Dollars.

GEORGE ALEXANDERS,

Foreman.

Question: How much, if any, of the damages thus found or allowed is for loss of crops or for injury to growing crops.

Answer: Loss of hay \$1674.00. Permanent injury to crop \$840.00.

GEORGE ALEXANDER,

Foreman.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. October 12th, 1921. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

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[83] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-partners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS, HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE AND COMPANY, a Corporation,

Defendant.

### **Judgment.**

This cause came on regularly for trial on the 11th day of October, 1921, the plaintiffs appearing by their attorneys, Messrs. Eugene E. Wager and J. C. Lloyd, and the defendant by its attorneys, Van Dyke & Thomas and J. D. Campbell, Esq., whereupon a jury of twelve persons was duly empanelled and sworn to try the cause; witnesses on the part of the plaintiffs and defendant were sworn and examined, and documentary evidence introduced; and after hearing the arguments of counsel and the instructions of the Court, the jury retired to consider of their verdict and thereafter returned into court a verdict signed by the foreman, as follows: We the jury in the above-entitled cause find for the plaintiffs, and assess their damages in the sum of \$3088.00, accompanied by the following special finding:

“Question: How much, if any, of the damages thus found or allowed is for loss of crops and for injury to growing crops?

“Answer: Loss of hay, \$1674.00; Permanent injury to crops, \$840.00.”

The motion of the plaintiffs for a judgment on the general verdict, having been granted, and the motion of the defendant for a judgment in favor of the plaintiffs and against the defendant in the sum of \$574.00 having been overruled,

It is CONSIDERED, ORDERED AND ADJUDGED by the Court that the plaintiffs do have and recover of and from the defendant the sum

[84] of \$3,183.21, together with their costs and disbursements taxed at \$——.

Dated this 17th day of April, 1922.

FRANK H. RUDKIN,  
Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. April 17th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

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[85] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-partners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS; HELEN S. AUSTIN, and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

**Exception to Judgment.**

Comes now the defendant Fairbanks, Morse & Company, a corporation, by its attorneys of record and excepts to the judgment on the verdict of the jury in the above-entitled action, signed by the Court on the 17th day of April, 1922.

Dated this 24th day of April, 1922.

VAN DYKE & THOMAS,  
J. D. CAMPBELL,

Attorneys for Defendant.

The foregoing exception of the defendant to the judgment on the verdict of the jury, entered in the above-entitled action on the 17th day of April, 1922, is hereby allowed.

Done in open court this 24th day of April, 1922.

FRANK H. RUDKIN,  
Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. April 27th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

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[86] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-partners Doing Business Under the Firm Name and Style of AUSTIN BROS., HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & CO., a Foreign Corporation,

Defendant.



**Petition for New Trial.**

Comes now the defendant, above named, Fairbanks, Morse & Co., a corporation, by Messrs. J. D. Campbell and Van Dyke & Thomas, its attorneys, and moves the Court that the verdict rendered herein and the judgment based thereon be set aside and that a new trial be granted herein, for the following causes which materially affect the substantiation rights of the said defendant, to wit:

1. Irregularity in the proceedings of the Court by which the defendant was prevented from having a fair trial.

2. Excessive damages, appearing to have been given under the influence of passion or prejudice.

3. Insufficiency of the evidence to justify the verdict or the judgment based thereon,—

In that it was not shown by pleadings or testimony that the special damages allowed for loss of crops, or permanent injury to the alfalfa, were reasonably supposed to be within the contemplation of the plaintiffs or defendant at the time the contract was signed, or that said special damages were such as might naturally be expected to follow its violation, or that defendant knew the extent of the plaintiffs' farming operations, the number of acres of alfalfa they had under cultivation, the number of acres of alfalfa they had intended to plant, or the precise [87] time of the year when water was needed upon lands in the locality of plaintiffs' ranch, to all of which defendant ex-

cepted at the trial and which exceptions were allowed.

4. Errors in law occurring at the trial;

(a) In allowing the plaintiffs to file the amendment to their complaint, to which filing the defendant excepted at the trial and which exception was allowed.

(b) In admitting the testimony of Levi Austin, one of the plaintiffs, regarding his conversation with Mr. Powell, the agent of defendant, prior to the execution of the contract upon which this suit is based, to the admission of which testimony the defendant excepted at the trial and which exception was allowed.

(c) In admitting any testimony whatever regarding loss of crops, or permanent injury to the alfalfa, upon the land of plaintiffs, to which admission the defendant excepted at the trial and which exception was allowed.

(d) In refusing to withdraw from the consideration of the jury the question of damages, if any, sustained by plaintiffs on account of loss of crops during the year 1920, or permanent injury to the alfalfa, on the ground that such damages, if any, are too remote, speculative, and not within the minds or contemplation of the parties at the time the contract was entered into, to all of which defendant excepted at the trial and which exception was allowed by the Court.

(e) In using the following language in instructing the jury:

“The third and fourth items relate to the loss of crops and injury to the crops and land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration. The plaintiffs are entitled to recover these items if you find from the testimony that the breach of the contract was the proximate cause of the loss or damage.

If you find that the plaintiffs suffered damages by reason of the loss of crops or injury to crops, and that the breach of the contract was the proximate cause of the resulting damages, then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the value of the alfalfa which they actually cut and harvested and the net value of [88] what they would have harvested had the contract been fulfilled. Of course, to determine the net value you must make deductions for all expense incurred in growing and harvesting the crop. The other item is based on the same ground. If you find that the alfalfa land was injured, that the growing alfalfa was injured, and that such injury resulted directly or proximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in this regard.”

To which foregoing part of the Court's instruction defendant excepted at the trial, and which exception was allowed.

(f) In rendering judgment on the verdict of the jury in favor of the plaintiffs and against the defendant for any sum in excess of Five Hundred Seventy-four Dollars (\$574.00) and costs, to which entry the defendant excepted and which exception was allowed by the Court.

This petition will be heard upon the pleadings and papers on file, upon the minutes of the court, the statement of facts prepared by the reporter from his shorthand notes, and the memoranda of proceedings in chambers hereto attached.

J. D. CAMPBELL,  
VAN DYKE & THOMAS,  
Attorneys for Defendant.

[89] United States of America,  
Western District of Washington,—ss.

Josiah Thomas, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant in the above-entitled cause; that he has read the foregoing petition for a new trial, knows the contents thereof, and believes the same to be meritorious and well founded in law and not interposed for the purpose of delay.

JOSIAH THOMAS.

Subscribed and sworn to before me this 24th day of May, 1922.

[Seal] CHARLES E. CONGLETON,  
Notary Public in and for the State of Washington, Residing in Seattle.



[90] Mr. CAMPBELL.—We move the Court to withdraw from the consideration of the jury the question of the damages, if any, sustained by plaintiffs on account of the loss of crops during the year 1920, or permanent injury to the alfalfa, on the ground and for the reason that such damages, if any, are too remote, speculative, and not within the minds or contemplation of the parties at the time the contract was entered into, and there can be no recovery therefor.

The COURT.—I will deny the motion to withdraw the question of damages for loss of crops and permanent injury to the alfalfa from the consideration of the jury, but will compromise with you by submitting a special finding to the jury, asking how much, if any, of the damages thus found or allowed is for loss of crops and for injury to the growing crops, and if they find against you let them find for the amount of damages sustained by reason of loss of crops and injury to the growing crops.

You can then file a motion for a judgment upon the verdict for general damages, and the plaintiffs can file a motion for judgment upon the verdict for general and special damages. You are apparently prepared on this question, and it comes as a surprise to the plaintiffs and they are not prepared on it and I have not had an opportunity to fully examine the authorities, but what authorities you have here would indicate that your motion should be granted. The plaintiffs may have ten days in which to submit their authori-

ties, and you may have ten days to reply. If, upon examination of the authorities submitted, I find that the question of special damages for loss of crops and permanent [91] injury to the alfalfa should not have been submitted to the jury, the verdict as to those items can be set aside, if necessary, without granting a new trial. At the time you move for judgment on the verdict for general damages and the plaintiffs move for judgment on the verdict for general and special damages, in the event a verdict is returned against you for both, feeling and believing as I do now, I will grant your motion.

Mr. CAMPBELL.—We except to that portion of the Court's ruling refusing to withdraw from the consideration of the jury the special damages for loss of crops and permanent injury to the alfalfa.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. May 26th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver.

[92] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiff,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

**Order Overruling Motion for New Trial.**

Defendant's motion that the verdict rendered herein and the judgment based thereon be set aside and that a new trial be granted herein having come on regularly for hearing and determination before the Court at Spokane, Washington, on this 9th day of October, 1922, said motion having been submitted by defendant without argument in order to get the same disposed of, it is

ORDERED, ADJUDGED AND DECREED that said motion of the defendant to have the verdict rendered herein and the judgment based thereon set aside and to have a new trial granted herein be and the same is hereby denied, to which

ruling the defendant excepts and the exception is hereby allowed.

Done in open court this 9th day of October, 1922.

FRANK H. RUDKIN,

Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

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[93] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN and NETTIE M. AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

**Petition for Writ of Error.**

Fairbanks, Morse & Company, defendant in the above-entitled action, feeling itself aggrieved by the verdict of the jury, and the judgment entered thereon, on the 17th day of April, 1922, comes now



by J. D. Campbell, and Van Dyke & Thomas, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and your petitioner will ever pray.

Dated, October 12, 1922.

J. D. CAMPBELL,  
VAN DYKE & THOMAS,  
Attorneys for Defendant.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

[94] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN and NETTIE M. AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

**Order Allowing Writ of Error.**

Upon motion of J. D. Campbell, and Van Dyke & Thomas, attorneys for the defendant in the above-entitled action, and upon filing the petition for a writ of error and an assignment of errors, it is ordered that a writ of error be, and hereby is, allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict of the jury and the judgment entered thereon, on the 17th day of April, 1922, and that the amount of bond on said writ of error be, and hereby is, fixed at \$3,500.00, which bond shall be a supersedeas bond.

Done in open court this 12th day of October, 1922.

FRANK H. RUDKIN,  
Judge of the United States District Court, for the  
Eastern District of Washington, Southern Division.

[Endorsed]: Filed in the U. S. District Court,  
Eastern District of Washington. Oct. 14th, 1922.  
Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

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[95] In the District Court of the United States  
for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copart-  
ners Doing Business Under the Firm Name  
and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN and NETTIE M.  
AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Cor-  
poration,

Defendant.

**Writ of Error.**

The President of the United States, to the Honorable, the Judge of the United States District Court, for the Eastern District of Washington, Southern Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the plaintiffs, Levi P. Austin and Jay R. Austin, copartners doing business under the firm name and style of Austin Brothers; Helen S. Austin and Nettie M. Austin, as Trustee, and Fairbanks, Morse & Company, a corporation, defendant, a manifest error hath happened to the great prejudice and damage of the said plaintiffs, Levi P. Austin and Jay R. Austin, copartners doing business under the firm name and style of Austin Brothers; Helen S. Austin, and Nettie M. Austin, as Trustee, as is said and appears by the petition herein.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings, aforesaid, with all things concerning the same, to the justices of the United States Court of Appeals, for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in said cir-



cuit on the —— day of [96] November, 1922, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct these errors what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 14th day of October, 1922.

Attest my hand and seal of the United States District Court for the Eastern District of Washington, Southern Division, at the Clerk's office in Yakima, Washington, on the day and year last above written.

[Seal] ALAN G. PAINE,  
Clerk of the United States District Court, for the  
Eastern District of Washington, Southern  
Division.

By Edwd. E. Cleaver,  
Deputy.

Allowed this 12th day of October, 1922.

FRANK H. RUDKIN,  
Judge of the United States District Court, for the  
Eastern District of Washington, Southern Di-  
vision.

[Endorsed]: Filed in the U. S. District Court,  
Eastern District of Washington. Oct. 14th, 1922.  
Alan G. Paine, Clerk. By Edwd. E. Cleaver, Dep-  
uty.

[97] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN and NETTIE M. AUSTIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendants.

### **Assignment of Errors.**

And now on this 12th day of October, 1922, came the defendant, by its attorneys J. D. Campbell and Van Dyke & Thomas, and say that the verdict of the jury, and the judgment entered thereon in the above-entitled cause, on the 17th day of April, 1922, is erroneous and unjust to defendant.

#### **I.**

The District Court erred in allowing the plaintiffs to file the amendment to their complaint, to which filing the defendant excepted at trial, and which exception was allowed.

#### **II.**

The District Court erred in admitting the testimony of Levi Austin, one of the plaintiffs, re-

garding his conversation with Mr. Powell, the agent of defendant, prior to the execution of the contract upon which this suit is based, to the admission of which testimony the defendant excepted at the trial, and which exception was allowed.

### III.

The District Court erred in admitting any testimony whatever regarding loss of crops, or permanent injury to the alfalfa, upon the land of plaintiffs, to which admission the defendant excepted at the trial, and which exception was allowed.

### [98] IV.

The District Court erred in refusing to withdraw from the consideration of the jury the question of damages, if any, sustained by plaintiffs on account of loss of crops during the year 1920, or permanent injury to the alfalfa, on the ground that such damages, if any, are too remote, speculative, and not within the minds or contemplation of the parties at the time the contract was entered into, to all of which defendant excepted at the trial and which exception was allowed by the court.

### V.

The District Court erred in using the following language in instructing the jury:

“The third and fourth items relate to the loss of crops and injury to the crops and land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration. The plaintiffs are entitled to

recover these items if you find from the testimony that the breach of the contract was the proximate cause of the loss or damage.

If you find that the plaintiffs suffered damages by reason of the loss of crops or injury to crops, and that the breach of the contract was the proximate cause of the resulting damages, then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the alfalfa which they actually cut and harvested and the net value of what they would have harvested had the contract been fulfilled. Of course, to determine the net value, you must make deduction of all expenses incurred in growing and harvesting the crop. The other item is based on the same ground. If you find that the alfalfa land was injured, and the growing alfalfa injured, and that such injury resulted directly and proximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in that regard."

to which foregoing part of the Court's instruction defendant excepted at the trial, and which exception was allowed.

## VI.

The District Court erred in rendering judgment on the verdict of the jury in favor of the plaintiffs and against the defendant, for any sum in excess of Five Hundred Seventy-four Dollars (\$574.00) and costs, in that it was not shown by pleadings



or testimony that the special damage allowed for loss of crops, or permanent injury to the alfalfa, were reasonably supposed to be within the contemplation of the plaintiffs or defendant at the time the contract was signed, or that said special damages were such as might naturally be expected to follow its violation, [99] or that defendant knew the extent of the plaintiffs' farming operations, and the number of acres of alfalfa they had under cultivation, the number of acres they had intended to plant, or the precise time of the year when water was needed upon lands in the locality of plaintiffs' ranch, to all of which defendant excepted at the trial, and which exceptions were allowed.

## VII.

The District Court erred in denying defendant's motion for a new trial.

WHEREFORE, the defendant prays that the judgment entered herein for any sum in excess of \$574.00, and costs, be reversed, vacated, and set aside, and that the District Court be directed to enter judgment in favor of plaintiffs and against defendant for the sum of \$574.00 only, together with costs.

VAN DYKE & THOMAS,  
J. D. CAMPBELL,

Attorneys for Defendant.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

[100] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN and NETTIE M. AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That we, Fairbanks, Morse & Company, a Corporation, as principal, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Levi P. Austin and Jay R. Austin, copartners doing business under the firm name and style of Austin Brothers, Helen S. Austin and Nettie M. Austin, as Trustee, in the full and just sum of \$3,500.00 to be paid to the said plaintiffs, their heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

SEALED with our seals and dated this 12th day of October, 1922.

WHEREAS, lately in the above-entitled court, in a suit depending in said court, between Levi P. Austin and Jay R. Austin, copartners doing business under the firm name and style of Austin Brothers, Helen S. Austin and Nettie M. Austin, as Trustee, as plaintiffs, and Fairbanks, Morse & Company, as defendant, a judgment was rendered against the said Fairbanks, Morse & Company, and the said Fairbanks, Morse & Company, having obtained a writ of error and filed a copy thereof in the office of the clerk of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Levi P. Austin and Jay R. Austin copartners doing business under the firm name and style of Austin Brothers, Helen S. Austin and Nettie M. Austin, as Trustee, citing and admonishing them to be and [101] appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

NOW, THEREFORE, the condition of the above obligation is such that if the said Fairbanks, Morse & Company, shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

FAIRBANKS, MORSE & COMPANY,

By J. D. CAMPBELL,

Its Attorney.

UNITED STATES FIDELITY & GUAR-  
ANTY COMPANY,

[Seal]

By O. W. ANDERSON,

Its Attorney in Fact.

Approved Oct. 12, 1922.

FRANK H. RUDKIN,  
Judge.

[Endorsed]: Filed in the U. S. District Court,  
Eastern District of Washington. Oct. 14th, 1922.  
Alan G. Paine, Clerk. By Edwd. E. Cleaver, Dep-  
uty.

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[102] In the District Court of the United States  
for the Eastern District of Washington, South-  
ern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copart-  
ners Doing Business Under the Firm Name  
and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN and NETTIE M.  
AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Cor-  
poration,

Defendant.

**Citation.**

United States of America; To the Plaintiffs, Levi  
P. Austin and Jay R. Austin, Copartners  
Doing Business Under the Firm Name and  
Style of Austin Brothers; Helen S. Austin;  
and Nettie M. Austin, as Trustee, and Their  
Attorneys, Eugene E. Wager and James Col-  
lins Lloyd, GREETING:



You are hereby notified that in a certain case at law in the United States District Court in and for the Eastern District of Washington, Southern Division, wherein Levi P. Austin and Jay R. Austin, copartners, doing business under the firm name and style of Austin Brothers; Helen S. Austin; and Nettie M. Austin, as Trustee, are complainants, and Fairbanks, Morse & Company is defendant, a writ of error has been allowed the plaintiff therein in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and you are cited and admonished to be and appear in said court at San Francisco, California, in thirty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected, and speedy justice done the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, Judge of the United States District Court, for the Eastern District of Washington, Southern Division, date this 12th day of October, 1922.

FRANK H. RUDKIN,  
Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

[103] In the District Court of the United States  
for the Eastern District of Washington, South-  
ern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copart-  
ners Doing Business Under the Firm Name  
and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN and NETTIE M.  
AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Cor-  
poration,

Defendant.

### **Order Staying Mandate.**

This cause coming on to be heard this 12th day  
of October, 1922, upon the application of the de-  
fendant for a writ of error to the United States  
Circuit Court of Appeals for the Ninth Judicial  
Circuit, and said writ of error having been al-  
lowed, the said defendant having executed a bond  
in the sum of \$3,500.00 as provided by law and  
the order of this court, the Clerk of the said  
Court is hereby directed to stay the mandate of  
the said District Court of the United States for  
the Eastern District of Washington, Southern Di-  
vision, until the further order of this court.

Dated this 12th day of October, 1922.

FRANK H. RUDKIN,  
Judge of the Above-entitled Court.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

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[104] In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copartners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN and NETTIE M. AUSTIN as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Defendant.

### **Order Settling Bill of Exceptions.**

The above matter came on duly and regularly for hearing on the 9th day of October, 1922, at Spokane, Washington, upon the application of the defendant for the settling and certifying of its proposed bill of exceptions filed herein and on the amendments proposed by plaintiffs to said bill of exceptions, and the said bill of exceptions having been presented, served and filed within the time allowed by law and the proposed amendments not

being in the form prescribed by the rules of this court, but the court nevertheless having carefully examined the same and being fully advised as to such proposed amendments to the bill of exceptions it is

ORDERED that the amendments proposed by plaintiff to the bill of exceptions and each of them be refused and not allowed.

IT IS FURTHER ORDERED that the proposed bill of exceptions heretofore filed by plaintiffs in this case is hereby approved, allowed and settled as the true, full and correct bill of exceptions in said cause, containing in full all of the material evidence and proceedings taken and had upon the trial of said cause and that the same as so settled and allowed be now here certified accordingly by the undersigned Judge of the said court who presided at the trial of said cause, and that the bill of exceptions when so certified be filed herein by the clerk.

The foregoing bill of exceptions is full, true and correct in all respects and is hereby approved, allowed and settled and made a part [105] of the record herein with plaintiffs' and defendants' exhibits thereto attached.

Done in open court this 9th day of October, 1922.

FRANK H. RUDKIN,  
Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.



[106] In the District Court of the United States  
for the Eastern District of Washington, South-  
ern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copart-  
ners Doing Business Under the Firm  
Name and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN and NETTIE M. AUS-  
TIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Cor-  
poration,

Defendants.

### **Proof of Service of Papers.**

State of Washington,  
County of Spokane,—ss.

A. Bolton, being first duly sworn, deposes and  
says: I am a citizen of the United States and of  
the State of Washington above the age of twenty-  
one years and competent to be a witness in the  
above-entitled action. That on the 12th day of  
October, 1922, I deposited in the postoffice at Spo-  
kane, Washington, properly wrapped for trans-  
mission through the mail with registered mail  
postage prepaid, the following papers, viz:

Order overruling motion for new trial.

Order settling bill of exceptions.

Assignment of errors.

Petition for writ of error.

Order allowing writ of error.

Writ of error.

Citation.

Bond upon writ of error.

Order staying mandate.

Praeceptum for transcript of record.

all addressed to Attorney James Collins Lloyd, at White Bluffs, Washington, and that there is a regular United States mail service between Spokane, Washington, and White Bluffs, Washington.

A. BOLTON.

Subscribed and sworn to before me this 12th day of October, 1922.

[Seal]

J. D. CAMPBELL,

Notary Public, Residing at Spokane, Washington.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

[107] In the District Court of the United States  
for the Eastern District of Washington, South-  
ern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copart-  
ners Doing Business Under the Firm  
Name and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN and NETTIE M. AUS-  
TIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Cor-  
poration,

Defendants.

**Praeceptum for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please prepare Transcript of Record  
in this cause, to be filed in the office of the Clerk  
of the United States Circuit Court of Appeals for  
the Ninth Judicial Circuit, under the writ of error  
heretofore perfected to said Court, and include in  
said transcript the following pleadings, proceed-  
ings and papers on file, to wit:

1. Complaint.
2. Answer and affirmative defenses.
3. Reply to affirmative defenses.
4. Motion to amend complaint.
5. Affidavit in support of amendment to com-  
plaint.

6. Bill of particulars.
7. Motion of plaintiffs for judgment on the verdict.
8. Motion of defendants for judgment on the verdict.
9. Memorandum of judgment.
10. Verdict of Jury.
11. Judgment, with defendant's exception to judgment and its allowance.
12. Petition for a new trial, with acknowledgment of service of said petition.
13. Order overruling motion for a new trial.
- [108] 14. Petition for writ of error.
15. Order allowing writ of error.
16. Writ of error.
17. Assignment of errors.
18. Bond on writ of error.
19. Citation upon writ of error.
20. Order staying mandate.
21. Bill of exceptions and order settling same.
22. All of the exhibits offered and admitted in evidence at the trial of the above-entitled cause.
23. Acknowledgment of service of the following papers or proof of service or both.
  - Order overruling motion for a new trial.
  - Order settling bill of exceptions.
  - Petition for writ of error.
  - Order allowing writ of error.
  - Writ of error.
  - Assignment of errors.
  - Bond on writ of error.



Praeipce for transcript of record.

Citation upon writ of error.

Order staying mandate.

Said transcript to be prepared as required by law, and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and to be filed in the office of the Clerk of the said Circuit Court of Appeals, at San Francisco, State of California, before the —— day of November, 1922.

Dated October 12, 1922.

VAN DYCKE & THOMAS,  
J. D. CAMPBELL,

Attorneys for Defendant.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 14th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

[109] We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing, as provided by the rules of said Court.

VAN DYCKE & THOMAS,  
J. D. CAMPBELL,

Attorneys for Defendant.

[110] In the District Court of the United States  
for the Eastern District of Washington, South-  
ern Division.

No. 871.

LEVI P. AUSTIN and JAY R. AUSTIN, Copart-  
ners Doing Business Under the Firm  
Name and Style of AUSTIN BROTHERS;  
HELEN S. AUSTIN and NETTIE M. AUS-  
TIN, as Trustee,

Plaintiffs,

vs.

FAIRBANKS, MORSE & COMPANY, a Cor-  
poration,

Defendants.

**Certificate of Clerk U. S. District Court to Tran-  
script of Record.**

United States of America,  
Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk of the United States  
District Court, for the Eastern District of Wash-  
ington; do hereby certify this typewritten tran-  
script of record consisting of pages numbered 1  
to 111 inclusive, to be a full, true, correct and com-  
plete copy of so much of the record, papers and  
other proceedings in the above and foregoing en-  
titled cause, as is required by praecipe of counsel  
filed and shown herein, as the same remain of  
record and on file in the office of the Clerk of said  
District Court, and that the same constitute the

record on return to said writ of error herein from the judgment of said United States District Court for the Eastern District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate, or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled Cause, to wit:

Clerk's Fee (Sec. 828, R. S. U. S.) for making record, Certificate or Return, 259 folios at 10¢ .....	\$25.90
Certificate of Clerk to Transcript of Record, 3 folios at 15¢ .....	\$ .45
[111] Seal to said Certificate .....	\$ .20
Certificate of Clerk to Original Exhibits, 1 folios at 15¢ .....	\$ .15
Seal to said Certificate .....	\$ .20

I hereby certify that the above cost for preparing and certifying recording, amounting to \$26.90, has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court,

at Yakima, in said District, this 7th day of November, 1922.

[Seal]

ALAN G. PAINE,  
Clerk United States District Court for the Eastern  
District of Washington, Southern Division,  
By Edwd. E. Cleaver,  
Res. Deputy Clerk, Yakima, Washington.

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[Endorsed]: No. 3941. United States Circuit Court of Appeals for the Ninth Circuit. Fairbanks, Morse & Company, a Corporation, Plaintiff in Error, vs. Levi P. Austin and Jay R. Austin, Copartners Doing Business Under the Firm Name and Style of Austin Brothers; Helen S. Austin; and Nettie M. Austin, as Trustee, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Southern Division.

Filed November 10, 1922.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





# United States Circuit Court of Appeals

For the Ninth Circuit

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No. 3941

FAIRBANKS, MORSE & COMPANY, A COR-  
PORATION, PLAINTIFF IN ERROR

vs.

LEVI F. AUSTIN AND JAY R. AUSTIN,  
CO-PARTNERS DOING BUSINESS UNDER THE FIRM  
NAME AND STYLE OF AUSTIN BROTHERS;  
HELEN S. AUSTIN; AND NETTIE M. AUS-  
TIN, AS TRUSTEE, DEFENDANTS IN ERROR

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE EAST-  
ERN DISTRICT OF WASHINGTON, SOUTH-  
ERN DIVISION

HONORABLE FRANK H. RUDKIN, JUDGE

BRIEF OF PLAINTIFF  
IN ERROR

FILED

JAN 27 1915

F. D. MONAHAN

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J. D. CAMPBELL

OLD NATIONAL BANK BUILDING, SPOKANE, WASHINGTON

JOHN B. VAN DYKE JOSIAH THOMAS

ATTORNEYS FOR PLAINTIFF IN ERROR

812 LOWMAN BUILDING, SEATTLE, WASHINGTON



# United States Circuit Court of Appeals

For the Ninth Circuit

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No. 3941

FAIRBANKS, MORSE & COMPANY, A CORPORATION,  
PLAINTIFF IN ERROR

vs.

LEVI F. AUSTIN AND JAY R. AUSTIN,  
CO-PARTNERS DOING BUSINESS UNDER THE FIRM  
NAME AND STYLE OF AUSTIN BROTHERS;  
HELEN S. AUSTIN; AND NETTIE M. AUSTIN,  
AS TRUSTEE, DEFENDANTS IN ERROR

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE EAST-  
ERN DISTRICT OF WASHINGTON, SOUTH-  
ERN DIVISION

HONORABLE FRANK H. RUDKIN, JUDGE

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## BRIEF OF PLAINTIFF IN ERROR

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## STATEMENT OF THE CASE

This action was brought by Austin Brothers, et al, the defendants in error, against Fairbanks Morse



& Co., the plaintiff in error, to recover damages, both general and special, for breach of contract of sale of pump and engine. In their complaint the defendants in error allege that they are the owners of a certain tract of land containing forty acres, and hold under a five-year lease, with re-leasing privileges, another tract of land, containing eighty acres, adjoining said tract of forty acres. This lease runs from October 27, 1917. All of said land, except a small portion thereof, is used for the raising of alfalfa; is situated in an arid country, and no crops can be raised thereon without irrigation.

On the 25th day of September, 1919, the defendants in error entered into a written contract with the plaintiff in error, whereby the plaintiff in error agreed to furnish and deliver to said defendants in error, a certain oil engine, of 25 h. p., and a certain 8-inch pump, together with pulleys, belts and other accessories, for the agreed price of \$2430.00, f. o. b. cars, Seattle, Washington, and to be shipped by plaintiff in error to defendants in error at Haven, Washington, via Milwaukee Railroad, so delivery could be made December 1, 1919.

This written contract is in the nature of a general proposal made by the plaintiff in error to the defend-

ants in error, dated September 25, 1919, and is signed for plaintiff in error by A .J. Powell, and was accepted in writing by defendants in error on September 25, 1919. It also was approved at Seattle, Washington, for said plaintiff in error, by C. R. Miller, its manager.

One of the paragraphs at the end of said proposal reads as follows:

“It is expressly understood this proposal made in duplicate contains all agreements pertaining to property herein specified, there being no verbal understanding whatsoever, and when signed by purchaser and approved by an executive officer or local manager of Fairbanks, Morse & Co., becomes a contract binding parties thereto.”

After alleging, in the first cause of action, the ownership of the said land, its character and the material parts of the written proposal, the defendants in error plead that the plaintiff in error failed to deliver said pump and engine to the defendants in error between the first day of December, 1919, and the 30th day of March, 1920, and the defendants in error, on or about said last named date, rescinded said proposal, and demanded the return of the \$200.00 advanced by them to plaintiff in error, together with such damages as they might suffer by

reason of its failure, neglect and refusal to fulfill said contract and obligation.

At the time of entering into said contract with plaintiff in error, the defendants in error state they had abandoned their existent system of irrigation, and, relying on the fulfillment of said contract by plaintiff in error, they had deprived themselves of other means of irrigating their land, except by the installation of a new system of pumping equipment.

By reason of defendants' failure to fulfill said contract by delivering said machinery to them as agreed in said contract, they had sustained damages, which they denominate in their first cause of action as general damages, in the sum of \$7,000.00. (Record, pp. 2-6.)

In the second cause of action, after alleging the ownership of the said land, its character, and the execution of the written contract, the defendants in error allege that in order to save their growing crops, they did, on or about the 30th day of March, 1920, succeed in securing the right to connect with a certain hydro-electric power system already installed on adjoining property, and to take power therefrom, and immediately constructed a transmission power line to their said land, and installed

thereon an electric motor and pumping system, and by this means were able to pump water to irrigate their lands and to save as much as possible the crops thereon, and to minimize the damage to their meadows by reason of lack of irrigation of same, until so late a stage in the season, caused by the failure of plaintiff in error to fulfill its contract.

Upon the second cause of action the defendants in error claim what they denominate as special damages, in the sum of \$1800.00.

After the service and filing of said complaint, the defendants in error, in response to the demand of the plaintiff in error for a bill of the particular items of the damages mentioned in the second cause of action of the complaint, and which constituted the special damages amounting to \$1800.00, submitted a bill of particulars, which is shown in the record on pages 19 and 20. In reality the items of damages set forth in said bill of particulars constitute general damages and not special damages, and were so treated by the litigants and the court on the trial.

In its answer and on the trial the plaintiff in error admitted the execution of the contract or written proposal between it and the defendants in error, and



also admitted that delivery of the pump and engine was not made on or before the 30th day of March, 1920. It also pleaded affirmatively in said answer the execution of said contract, its modification by agreement between plaintiff in error and defendants in error, so as to extend the time of delivery until plaintiff in error could ascertain when said delivery could be made, and the arbitrary cancellation and rescission of said contract by the defendants in error on the 30th day of March, 1920, the offer to furnish the defendants in error with a temporary unit, consisting of engine and pump on April 2, 1920, confirmed in writing thereafter on April 9, 1920, the refusal of said proposition by defendants in error, and the delivery of the pumping equipment mentioned in said proposal and acceptance on April 30, 1920, which delivery was refused by defendants in error, and that any damages sustained by the defendants in error was due to their failure to use ordinary endeavors to get another pumping equipment to meet their needs or to accept the several offers made by the plaintiff in error to furnish them with a temporary equipment to meet their needs, it being possible for them to procure engines and pumps in the state of Washington, and which plaintiff in error could have procured for them had they permitted it to do so.

The fourth and last affirmative defense of the plaintiff in error sets forth, that the damages claimed by defendants in error to be the result of the failure of the plaintiff in error to deliver the pumping equipment mentioned in the complaint, were not such damages as were within the contemplation of the parties at the time the contract was made, and were too remote and speculative to be considered.

About eight days before the case came on for trial the defendants in error served upon the plaintiff in error a motion for leave to amend their complaint, by adding to their first cause of action a new paragraph, denominated ten and one-half, reading as follows:

“X $\frac{1}{2}$

“That the said machinery contracted for as aforesaid, was purchased by the said plaintiffs to be used by them in pumping water from a newly constructed well on their said land, during the irrigation season of 1920, and subsequent years, to irrigate all of the land hereinbefore described, which was then under cultivation, the said well being supplied by a direct, continuous and abundant and sufficient flow of water from the Columbia River, to which it was

in close proximity, and the said plaintiffs, relying upon the fulfillment of said contract by defendants, had from the time of entering into said contract, and by reason thereof, abandoned and deprived themselves of all other means of irrigating said land; all of which facts were well known to defendant, their agents and servants, at the time said contract was made and at all times thereafter." (Rec. p. 49.)

They also moved for leave to amend said complaint by inserting immediately after the word "paid" in the fifteenth paragraph of said first cause of action, the following allegation:

"The said damages consisting, first, in the loss of 250 tons of alfalfa hay, of the value of \$5000.00 (Five Thousand Dollars), which would have grown and been harvested on said land in excess of the quantity of alfalfa that did grow and was harvested thereon, during the crop year of 1920, if said defendants had fulfilled their said contract, so that plaintiffs could have pumped water to irrigate said land at and during the time they were deprived of the means of pumping water, by reason of the failure of defendants to fulfill the said contract, but which alfalfa was lost to plaintiffs by reason of plaintiff not being able to pump any water to irrigate said land, for about six weeks or more after the time when said land should have begun to be irrigated, because of defendant's failure to furnish said machinery as agreed in said contract, or in time to enable plaintiffs to begin pumping water afore-

said in time to save the crop. And secondly, by the total destruction of the alfalfa plant, and the roots thereof, on seven acres of said land, and permanent injury to the alfalfa plant on thirty-five additional acres of said land, by reason of the deprivation of the means of pumping water, to properly irrigate said land, as aforesaid, because of the failure of defendant to fulfill said contract; the said last-mentioned injury to said forty-two acres of land causing plaintiffs additional damage in the sum of \$2000.00 (Two Thousand Dollars)." (Record, pp. 50 and 51.)

By these amendments the defendants in error changed their first cause of action from one for general damages to one for special damages, and the amendments were by the court allowed at the commencement of the trial, to which allowance the plaintiff in error took exception and the exception was allowed. (Record, pp. 55-58.)

Upon the trial Levi Austin, one of the defendants in error, testified as to the amount of their general damages caused by being compelled to put in a temporary pumping plant, and also as to special damages sustained by them by reason of loss of crops and permanent injury to the alfalfa land. All of the testimony as to the special damages for loss of crops and permanent injury to the alfalfa land went



in over the objection of plaintiff in error, because it claimed such damages were too remote, speculative and not within the minds or the contemplation of the parties at the time the contract was entered into, and no recovery could be had therefor. (Record, pp. 58-67.)

The testimony of Jay Austin, also one of the defendants in error, as to the amount of special damages, was admitted over the objection of the plaintiff in error (Record, pp. 72-73).

It will be observed that the written proposal of plaintiff in error to defendants in error to furnish the pumping plant was accepted for defendants in error by Levi F. Austin, who was the only one who testified in regard to the execution of said contract on the part of the defendants in error. We quote in full from the record his testimony on that point, with the objection of counsel for plaintiff in error, and the ruling of the court thereon.

“Mr. Powell, the traveling agent of the defendant, and Mr. Zane, the local agent at Hanford, came to our ranch relative to buying this pumping plant. Mr. Powell’s name appears on the contract, which is the first proposal we had. He was on or over our land prior to the execution of the contract, and I went over the problem of irrigation with him.

"Q. What was said to him relative to the purpose for which you wanted this plant?

"MR. THOMAS: We object to this testimony on the ground that the contract speaks for itself, and merges all prior contemporaneous agreements all merged in the written contract.

"THE COURT: My understanding is you can always show execution of the written contract and it is not to bar you proving that fact.

"Objection overruled, answer the question.

"A. Yes, we went into details of the plant, that it was not satisfactory for the acreage we had in then, and we wanted to put in more acreage and we went into details as to the different lifts and the amount of water required and he proposed this twenty-five horsepower outfit connected to an 8-inch pump would be exactly what we would want for this condition and the amount of water.

"Q. Did the agent go with you over this land at the time you had this conversation? A. Yes.

"Q. Did you, or did you not make known to the agent of the defendant the full purpose?

"MR. THOMAS: Objected to, as the question is leading.

"THE COURT: You can ask him what the agent said in regard to it.

"A. Yes, we told him our problem there for irrigation, and at this time the outfit we had there was not satisfactory, we were not getting enough water, and we told him that we must make a change of some kind and asked what he would recommend to fit our purpose and he proposed that we take at least a twenty-five horsepower engine and connect it to this 8-inch pump, and later on, if we cared to put in a larger pump, this twenty-five horsepower outfit would furnish the power. We told him at that time it would be necessary to have the outfit delivered in time, account of the water in the spring, well, he assured us if we would place our order at that time there would be no question about the delivery of the machinery.

"Q. Was anything said further by you as to the time necessary for the delivery?

"A. Nothing further, that would be delivered about the first of December.

"Q. Why was it to be delivered by the first of December?

"A. Well, he had to install the engine and machinery there, and it takes more or less time; we thought we would install that during the winter so in our busy season we would have it ready for irrigation next year.

"Q. Was anything said by the agent as to the time the land there should be irrigated there that season?

"THE COURT: What was said?

"A. We discussed that point and it was understood we were to begin irrigation about the first of April. In going into the contract for the machinery to be delivered the 8th of December it would give us plenty of time to have the outfit installed and begin pumping by the first of April, that was understood between us and the agent.

"Q. Did you fix any definite date on which you were to have this pumping plant in operation to irrigate your property for 1920? A. Yes.

"Q. What was the date fixed? A. April first."  
(Record, pp. 68-70.)

Eck Baughn, one of the witnesses for the defendant in error, who had been an electrical engineer for fifteen years and an irrigation engineer for eleven years, testified that he knew the lands owned by defendants in error, and had been over and across them at various times, and was familiar with the soil conditions of these lands. He said they were composed of what is known as Ephrata fine soil, mixed with gravel, with emphasis on the gravel. There is a difference in the amount of water necessary for such as that, and land situated in the Yakima Valley. Four times as much water as is needed in the Yakima Valley is needed



on the soil of the Austin place. On the pumping plant they figure the Yakima Valley twice what they have for gravity, and on the Columbia River they double up on that. (Record, p. 77.)

On cross-examination he further testified that up in the district where Austin Brothers' property is situated, four times the Yakima government allowance of water is required to irrigate properly, on account of the soil there. (Record, p. 78.)

Jay Austin, one of the defendants in error, testified that during the years 1916, 1917 and 1918 was the only year they got water from the well on the north side of the forty-acre tract prior to the first day of May. The usual time they began irrigation from that well was on the first of May. They did not have water in the well sufficient to irrigate before that time. That well just came in year by year, with the exception of the year 1918, along about the first of May every year. When water was put on there the 1st of May they raised three crops on the land. None of the hay was damaged during these years. If they had had the equipment installed by May 1st, 1920, they would have been able to raise the same amount of crops, practically, as were raised in 1917, 1918

and 1919 on that land by geting water on there the 1st of May. (Record, pp. 73-75.)

The testimony of C. R. Miller, local manager of plaintiff in error, at the Seattle office, was to the effect that after the equipment was ordered by defendants in error from plaintiff in error, the order was placed by telegraph with the factory, and an endeavor made to get delivery as quickly as possible. There was a shortage of raw material of every kind, and a shortage of labor, and every manufacturer was behind with deliveries at that time, and his company had great difficulty in procuring material and making these engines and pumps.

Mr. Powell, the salesman who sent in the proposal and acceptance signed by Levi F. Austin for the defendants in error, was not with the company at the time of the trial, and he did not know where he was. Powell did not at any time inform the company as to the conditions at the Austin place, where this pump was to be located. Levi Austin called at the place of business of plaintiff in error in the latter part of December, 1919, and wanted to know if the engine he had ordered was of the latest type, and some information about its con-

struction, and the witness personally showed him another engine exactly like it, and gave him the information he wanted. He looked at the engine, and was apparently satisfied with it. Nothing else was said by Mr. Austin at that time, other than he was interested in a larger sized engine, which he expected to buy the following year or late that sesason. Mr. McIntosh, of his firm, was looking after the details of this transaction. He knew Mr. Zane at Hanford. He is what they call a dealer, a Z Engine Dealer. He sells the small type Z engine, 1½, 3 and 6 h. p. sizes. He buys the engines outright from plaintiff in error, and re-sells them. That is about all there is to the transaction. The company makes arrangements with him whereby he can buy these engines at what they call dealer's prices. The 6 h. p. is the largest engine he buys from the company on these terms. Above the 6 h. p. the company sells directly throughout the country through salesmen.

In response to a question asked by counsel for plaintiff in error of this witness, counsel for defendants in error objected because it was not shown that the witness knew where the land is located, had ever been on it, or knew how long it would take to

deliver there, and conditions surrounding it. The witness thereafter testified that he had never been on the lands of the defendants in error, and knew nothing of the condition of the country. (Record, pp. 78-81.)

Mr. W. J. McIntosh, a witness for plaintiff in error, testified as to the efforts made by him to obtain a temporary pump and engine for defendants in error, until the permanent equipment was ready for delivery. In response to a question asked Mr. McIntosh by counsel for plaintiff in error, counsel for the defendants in error objected because he did not know anything about the nature of the country where the defendants in error resided, never had been there, and did not know the conditions as to the installation. (Record, pp. 81-82.)

At the conclusion of the trial the plaintiff in error moved the court to withdraw from the consideration of the jury the question of damages, if any, sustained by the defendants in error, on account of the loss of crops during the year 1920, or permanent injury to the alfalfa, on the ground and for the reason that such damages were too remote, speculative, and not within the minds or



contemplation of the parties at the time the contract was entered into, and there could be no recovery therefor. (Record, pp. 91-92.)

In passing upon this motion the court made the following statement:

“THE COURT: I will deny the motion to withdraw the question of damages for loss of crops and permanent injury to the alfalfa from the consideration of the jury, but will compromise with you by submitting a special finding to the jury, asking how much, of any of the damages thus found or allowed is for loss of crops and for injury to the growing crops, and if they find against you, let them find for the amount of damages sustained by reason of loss of crops and injury to the growing crops. You can then file a motion for a judgment upon the verdict for general damages and the plaintiff can file a motion for judgment upon the verdict for general and special damages. *You are apparently prepared on this question and it comes as a surprise to the plaintiffs and they are not prepared on it and I have not had an opportunity to fully examine the authorities, but what authorities you have here would indicate that your motion should be granted.* The plaintiffs may have ten days in which to submit their authorities, and you may have ten days to reply. If upon examination of the authorities submitted, I find that the question of special damages for loss of crops and permanent injury to the alfalfa should not have been submitted to the jury, the verdict as to those

items can be set aside, if necessary, without granting a new trial. At the time you move for judgment on the verdict for general damages and the plaintiffs move for judgment on the verdict for general and special damages, *in the event a verdict is returned against you for both, feeling and believing as I do now, I will grant your motion.*" (Record, pp. 92-93.)

The plaintiff in error excepted to that portion of the court's ruling refusing to withdraw from the consideration of the jury the question of special damages for loss of crops and permanent injury to the alfalfa, and the court then proceeded to instruct the jury as follows:

"This is an action to recover damages for breach of a contract for the sale of a pumping plant. The execution of the contract is admitted, and it is also admitted there was a breach of the contract on the part of the defendant. In other words, the contract called for delivery of pumping plant on or before December 1, 1919, and it was admitted that it was not delivered or tendered until subsequent to March 30, 1920. The only questions before you, therefore, relate to the measure of damages. The items of damages claimed are four in number. The first item is for the return of the \$200.00 paid at the time of the execution of the contract. The second item claimed is the cost of the installation of a temporary plant to supply

water after breach of the contract set forth in the complaint. The third item is for loss of crops during 1920, and the fourth is for permanent injury to the alfalfa growing on the land. The first item of \$200.00, under the contract, plaintiffs, as a matter of course, are entitled to recover, with legal interest from the 30th day of March, 1920. Conceding that the contract was breached by the defendant as claimed, as said by the Supreme Court of the United States:

“‘Where a party entitled to the benefit of a contract can save himself from loss arising from breach of it at a trivial expense or with reasonable exertion, it is his duty to do it, and he can charge the delinquent with such damage only as with reasonable endeavors and expense he could not have prevented.’

“In other words, if you find the contract was breached by the defendant, and I charge you it was so breached, it then became the duty of the plaintiffs to make reasonable exertion to mitigate the damages. If they have failed in this they cannot recover. If they did exercise reasonable care to avoid damages they are entitled to recover whatever damages they suffered in so doing. They are not entitled to recover the expense of installing their plant, however, because that is not the true measure of damages. They could not retain the plant and recover the entire cost of installation. The measure of damages is the difference between the actual value of the plant at the expiration of such time as



the plaintiffs should have installed the plant called for by the contract, or some other plant to serve the same purpose, and the cost and expense of installation. The third and fourth items relate to the loss of crops and injury to the crops, or land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration. The plaintiffs are entitled to recover these items if you find from the testimony that the breach of contract was the proximate cause of the loss or damage. The Supreme Court of the United States has defined proximate cause, as follows:

“ ‘It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as the oft cited case of the squib thrown in the market place. *Scott v. Sheppard*, (Squib case) 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation. Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new, independent, cause, intervening between the wrong and the injury? It is admitted that the rule is difficult of application, but it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong,



is the proximate cause of an injury, it must appear that the injury was natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances.'

"If you find that the plaintiffs suffered damages by reason of the loss of crops or injury to crops, and that the breach of the contract was the cause of the resulting damages then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the value of the alfalfa which they actually cut and harvested and the net value of what they would have harvested had the contract been fulfilled. Of course to determine the net value you must make deductions for all expense incurred in growing and harvesting the crop. The other item is based on the same ground. If you find that the alfalfa land was injured, that the growing alfalfa was injured, and that such injury resulted directly or proximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in this regard.

"You, gentlemen of the jury, are the sole judges of the facts in this case and of the credibility of the witnesses. Before reaching a verdict, you will carefully consider and compare all the testimony; you will observe the demeanor of the witnesses upon the stand, their interest in the result of your verdict, if any such interest is disclosed; their knowledge of the facts in relation to which they have

testified; their opportunity for hearing, seeing or knowing the facts; their bias or prejudice and all the facts and circumstances given in evidence or surrounding the witnesses at the trial. I further charge you, that if you find from the testimony that any witness has wilfully testified falsely to a material fact you may disregard the testimony of such witness entirely, except in so far as he is corroborated by other credible testimony, or by other known facts in the case.

“The burden of proof is upon the plaintiffs in this case to establish their claim by a preponderance of the testimony. A preponderance of the testimony does not necessarily mean the greater number of witnesses, but rather the convincing force of the testimony as against the testimony offered by the opposing party.

“Your verdict, of course, must be based on the evidence and not upon mere conjecture or guess work. *There is some question in this case whether the parties are entitled to recover for loss of crops, or injury to the crops, but that is a question of law for the consideration of the court*, and I have therefore submitted to you a general verdict in favor of plaintiffs, and also the following verdict, or finding:

“How much, if any of the damages thus found, or allowed, is for the loss of crops and for injury to the growing crops?”

To that part of the court's instructions to the jury relative to proximate cause not quoted from

the United States' decision, reading as follows:

"The third and fourth items relate to the loss of crops and injury to the crops or land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration. The plaintiffs are entitled to recover these items if you find from the testimony that the breach of the contract was the proximate cause of the loss or damage.'

"If you find that the plaintiffs suffered damages by reason of the loss of crops or injury to crops, and that the breach of the contract was the proximate cause of the resulting damages, then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the value of the alfalfa which they actually cut and harvested and the net value of what they would have harvested had the contract been fulfilled. Of course to determine the net value you must make deductions for all expenses incurred in growing and harvesting the crop. The other item is based on the same ground. If you find that the alfalfa land was injured, that the growing of alfalfa was injured, and that such injury resulted directly or approximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in this regard."

the plaintiff in error duly excepted, and its exception was allowed. (Record, pp. 93-98.)

The jury, after a short absence, returned to the court, with a verdict in favor of the defendants in error and against plaintiff in error for general and special damages in the sum of \$3,088.00; \$574 of said amount being general damages, and \$2,514.00 thereof being special damages, divided as follows:

Loss of hay-----\$1,674.00

Permanent injury to crops----- 840.00

The defendants in error thereafter moved for judgment on the verdict of the jury in their favor and against the plaintiff in error, in the sum of \$3,088.00, and the plaintiff in error moved for judgment on the verdict of the jury in favor of the defendants in error and against the plaintiff in error, for the sum of \$574.00, together with costs.

The motion of the defendants in error for judgment on the verdict of the jury was granted, and the motion on the part of the plaintiff in error for judgment on the verdict of the jury for general damages only, was denied. A judgment was thereafter entered on the verdict of the jury, to which judgment the plaintiff in error excepted and its exception was allowed. (Record, pp. 99, 107, 108.)



Upon the motion of the plaintiff in error for judgment on the verdict for general damages, and the motion of defendants in error for judgment on the verdict for general and special damages, briefs were presented to the court.

In its memorandum decision, the learned trial judge used the following language:

“I have carefully considered the exhaustive briefs submitted by the respective parties, and have examined the numerous authorities cited, as well as others, but any attempt to review the many apparently conflicting decisions would be of no avail. *Suffice it to say that while the case is perhaps on the border line, I am not prepared to declare as a matter of law that the jury was not warranted in finding that such damages were within the contemplation of the contracting parties at the time the contract was entered into and flowed directly and approximately from the breach complained of.*” (Record, pp. 104-105.)

Thereafter a petition for a new trial was served and filed by the plaintiff in error (Record, pp. 110-115), and on the 9th day of October, 1922, the said petition for a new trial was, by the court, denied, to which ruling the plaintiff in error duly excepted and its exception was allowed. (Record, pp. 116-117.)

This writ of error is prosecuted to this court for the purpose of reversing the judgment of the trial court to the extent of setting aside the special damages assessed against the plaintiff in error, and to enter a judgment only for the general damages in favor of the defendants in error and against the plaintiff in error.



## ASSIGNMENT OF ERRORS

### I

The District Court erred in allowing the plaintiffs to file the amendment to their complaint, to which the defendant excepted at the trial, and which exception was allowed.

### II

The District Court erred in admitting the testimony of Levi Austin, one of the plaintiffs, regarding his conversation with Mr. Powell, the agent of defendant, prior to the execution of the contract

upon which this suit is based, to the admission of which testimony the defendant excepted at the trial, and which exception was allowed.

### III

The District Court erred in admitting any testimony whatever regarding loss of crops, or permanent injury to the alfalfa, upon the land of plaintiffs, to which admission the defendant excepted at the trial, and which exception was allowed.

### IV

The District Court erred in refusing to withdraw from the consideration of the jury the question of damages, if any, sustained by plaintiffs on account of loss of crops during the year 1920, or permanent injury to the alfalfa, on the ground that such damages, if any, are too remote, speculative, and not within the minds or contemplation of the parties at the time the contract was entered into, to all of which defendant excepted at the trial and which exception was allowed by the court.

V

The District Court erred in using the following language in instructing the jury:

“The third and fourth items relate to the loss of crops and injury to the crops and land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration: The plaintiffs are entitled to recover these items if you find from the testimony that the breach of the contract was the proximate cause of the loss or damage.

“If you find that the plaintiffs suffered damages by reason of the loss of crops or injury to crops, and that the breach of the contract was the proximate cause of the resulting damages, then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the alfalfa which they actually cut and harvested and the net value of what they would have harvested had the contract been fulfilled. Of course, to determine the net value, you must make deductions of all expenses incurred in growing and harvesting the crop. The other item is based on the same ground. If you find that the alfalfa land was injured, and the growing alfalfa injured, and that such injury resulted directly and proximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in that regard.”



to which foregoing part of the court's instruction defendant excepted at the trial, and which exception was allowed.

## VI

The District Court erred in rendering judgment on the verdict of the jury in favor of the plaintiffs and against the defendant, for any sum in excess of five hundred seventy-four (\$574.00) dollars and costs, in that it was not shown by pleadings or testimony that the special damages allowed for loss of crop, or permanent injury to the alfalfa, were reasonably supposed to be within the contemplation of the plaintiffs or defendant at the time the contract was signed, or that said special damages were such as might naturally be expected to follow its violation, or that defendant knew the extent of plaintiffs' farming operations, and the number of acres of alfalfa they had under cultivation, the number of acres they had intended to plant, or the precise time of the year when water was needed upon lands in the locality of plaintiff's ranch, to all of which defendant excepted at the trial, and which exceptions were allowed.

## VII

The District Court erred in denying defendants' motion for a new trial.

WHEREFORE the defendant prays that the judgment entered herein for any sum in excess of \$574.00 and costs, be reversed, vacated, and set aside, and that the District Court be directed to enter judgment in favor of plaintiffs and against defendant for the sum of \$574.00 only, together with costs.



## ARGUMENT AND AUTHORITIES

The plaintiff in error concedes that defendants in error are entitled to the recovery of general damages in the sum of \$574.00, and the only question presented by the assignment of errors in this case is whether or not the defendants in error have made out a case entitling them to recover a judgment for special damages in addition to the general damages. The correct determination of this legal proposition is of vital importance to the plaintiff

in error as well as to all other people engaged in the manufacture and sale of machinery, as a decision of this court in this case will, to a large extent, govern future sales made by manufacturers and wholesalers of machinery in this district. If the plaintiff in error is in effect an insurer of profits which may be made by its customers, when, without negligence on its part it fails to make delivery of machinery at the time ordered, it, as well as other manufacturers will hesitate to contract to deliver machinery at a definite date, or if it does so will be obliged to charge an exorbitant price in order to reimburse itself for losses that it must suffer through the occasional breach of its contract to deliver. If such damages under such circumstances are allowed the result to business will be disastrous. The enormous damages that might ensue in the breach of the smallest contract may be so augmented that one would not be safe in doing any kind of business.

We respectfully submit that under the pleadings and the evidence in this case the defendants in error are not entitled to recover any special damages, because such special damages were not within the contemplation of the parties at the

time the contract was made and are too remote and speculative to be considered. The trial court erred in submitting the alleged special damages to the jury and should have granted the motion of the plaintiff in error to take such question away from the jury, and should have decided as a matter of law that there was no occasion for submitting such question to the jury. The evidence in this case is susceptible of only one reasonable inference and therefore a question for the court under all of the authorities; that is, the evidence as to the special damages claimed by defendants in error in their first cause of action.

When the motion was made by plaintiff in error to withdraw from the consideration of the jury the question of special damages, and the authorities in support of such motion were presented, the court believed that such motion should be granted, but because the defendants in error were not prepared to meet the issue with authorities the court reserved his decision until the hearing of the motion for judgment on the verdict of the jury. (Record, pp. 92, 93.)

In his instructions to the jury the trial judge used the following language, showing that he was not



satisfied that the question of special damages should be submitted to them:

“There is some question in this case whether the parties are entitled to recover for loss of crops, but that is a question of law for the consideration of the court, and I have therefore submitted to you a general verdict in favor of the plaintiffs, and also the following special verdict or finding.

“How much, if any, of the damages thus found or allowed is for the loss of crops and for injury to the growing crops?”

The plaintiff in error was justified in assuming that upon the hearing of the motions for judgment on the verdict of the jury, the submission of the question of special damages would be considered the same as if the jury had not brought in its verdict at all, that is to say, the question would be decided by the court without any regard to the fact that the jury had brought in a finding holding the plaintiff in error liable for the special damages. The trial court, however, while conceding that the case was on the border line, was not prepared to declare as a matter of law that the jury was not warranted in finding that such damages were within the contemplation of the contracting parties at the time the contract was entered into and flowed directly and approximately from the breach com-

plained of. We expected this question to be decided without regard to any finding of the jury. The question, as we understood it, was not as to whether the jury was warranted in finding that such special damages were within the contemplation of the parties at the time the contract was made, but were the facts in evidence sufficient in law to make out a case for the defendant in error upon the question of special damages justifying their submission to a jury. It is an oft quoted saying that "out of the facts the law arises," and we believe that we can probably be of more assistance to the court in this case in deciding the question involved if we cite the facts in adjudicated cases, and then apply the law of those cases thereto, in order to compare the facts and the law with those applicable in this case. There is no dearth of authority, both English, Canadian, State and Federal, upon this subject, and the only difficulty is to narrow them down and present only what might be termed "leading cases."

The general principles of law governing the recovery of special damages for breaches of contract, as enunciated in the text books and adjudicated cases, are not disputed by us. The difference, however, is to be found in the application of these

principles rather than in the principles themselves. As well said by Judge Deady, in *Hunt v. Oregon Railway Company*, 36 Fed. 481:

“The difference in this and like cases lies not in the ascertainment of the law of the subject, but the application thereof.” Citing 1 Sedgwick Damages, 65.

What the defendant in error seeks to do in this case, is to recover special damages arising, not directly and immediately by reason of the alleged breach of the written contract itself, but arising wholly and solely from matters which are entirely collateral to the contract.

The rule with respect to the recovery of damages for a breach of contract was stated so well in the case of *Hadley v. Baxendale*, 9 Ex. 341, that it has become a classic in the law. In that case, the plaintiffs, who were the owners of a flour mill, sent a broken shaft to the defendant, who was a common carrier, to be conveyed by him to a manufacturer of such machinery, the purpose being that the broken shaft might serve as a pattern for a new one. The defendant was informed that the mill was stopped and that the broken shaft must be delivered immediately. The delivery of the shaft was unreasonably delayed, in consequence of which the

plaintiffs did not receive a new shaft for some days after the time that it ought to have been received, and they were therefore unable to run their mill, thereby incurring loss of profits. The court, speaking through Baron Alderson, held that such damages could not be recovered, saying:

“Now, we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

\* \* \*

“It follows, therefore, that the loss of profits here cannot reasonably be considered such a con-



sequence of the breach of contract, as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contracts, communicated to or known by the defendants."

It is to be noted that in the last named case, the carrier was informed that the mill was stopped, and that the broken shaft must be returned immediately, and for that reason the shipper claimed the carrier should be held to a knowledge that there might be a loss of profits resulting therefrom, and that the shipper would suffer loss so long as the mill was stopped. In the case at bar it is not alleged or proved that any of the special circumstances relating to the extent of Austin Brothers' farming operations; the number of acres of alfalfa they had under cultivation; the number of acres they had intended to plant, or the precise time of the year that water was needed upon the lands in the vicinity of their ranch, were called to the attention or were within the knowledge of the plaintiff in error, but only that the defendants in error were the owners of certain lands, and that they

had deprived themselves of the means of irrigating them except by the purchase of the pumping equipment from plaintiff in error, all of which facts they say in the amendment to their first cause of action, were well known to plaintiff in error at the time said contract was made and at all times thereafter. Many contingencies might happen which would prevent the anticipated profits, so the same cannot be said to be within the contemplation of the parties at the time the contract was made.

We submit that the information which Levi Austin, one of the defendants in error, communicated to the salesman of plaintiff in error, did not relate in any wise or at all to the subject matter of the contract, nor did it relate to any existing facts, circumstances or condition, even remotely connected with the contract.

In the case of *Pennypacker v. Jones*, 106 Pa. 237, the plaintiffs owned and operated a flour mill, and entered into a contract with the defendants, by the terms of which the defendants were to place in the mill within the time specified, machinery of a certain capacity to make flour of high grade. When the machinery was installed, it was found that it did not make a high grade of flour and was in-

capable of producing the number of barrels per day stipulated in the contract. The plaintiffs brought an action against the defendants for breach of contract, and claimed as damages their loss of possible profits which might have been made if the mill had run properly. The court held that the loss of possible profits was not a proper subject for damages, saying:

“It was no part of this contract that the plaintiffs should make profits, or even have the opportunity of doing so, by carrying on a business with the machinery which the defendants agreed to erect. It is not like the sale of chattels or of land, where the difference between the contract value and the actual market value of the property sold represents directly and immediately the measure of the party's loss or gain in the transaction. There the possible profit is the very object of the contract and is necessarily in the contemplation of the parties. But when a machinist furnishes machinery to a mill owner it is no part of his agreement that a profitable business shall be carried on with the machinery furnished. Of course, if it is defective he is responsible for the damage resulting directly from such defect; but that is a very different thing from the uncertain, remote and speculative profits which may or may not be made in the business to be done.”

In speaking of damages as anticipated profits, Davies, J., in *Corbin v. Thompson*, 39 Can. S. C., 575, says:

“Such profits are only recoverable when they can be held to be what are called primary profits, such as would have occurred and grown out of the contract itself as the direct and immediate result of its fulfillment. Then they are part and parcel of the contract itself, and must have been in contemplation of the parties when the agreement was entered into. But if they are such as would have been realized from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as part of the damages occasioned by the breach of the contract in suit, unless indeed the defaulting contractor has expressly contracted to be bound for such consequences, or the special circumstances are such that he may be held to have impliedly contracted to be so bound.”

So in the case at bar, the sole and only obligation under the written contract or proposal, and the testimony, was the furnishing of a pumping equipment within the time specified; it was no part of the agreement that the defendants in error should make profits from their land, and especially so when it is considered that neither the land nor the



anticipated profits bore any relation whatever to the contract.

The two cases presented to the trial court and which almost persuaded him to take the question of special damages away from the jury, were:

*Stebbins v. Selig*. 257 Fed. 230, decided by the Circuit Court of Appeals for the Eighth Circuit, on April 7th, 1919, and *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 47 L. Ed. 1171, decided June 1, 1903.

In *Stebbins v. Selig*, *supra*, the plaintiff sued defendant to recover damages for the breach of a written contract between them, whereby the defendant agreed to drill an irrigation well on plaintiff's farm and install a pump thereon within twenty days from date of contract. The complaint set out the contract, alleged the failure of defendant to perform, and that as a result thereof plaintiff was compelled to make a new contract for the same purpose at a difference in cost of \$675.00 over and above what the well and pump would have cost if defendant had performed his contract. The paragraph of the complaint alleging special damage is then set forth verbatim in the opinion of the court, and we respectfully call the court's attention to

the language used by the plaintiff in pleading the special damages. To the paragraph alleging special damage the defendant filed a demurrer upon the ground that it did not state a cause of action for the damages claimed in said paragraph. This demurrer was sustained by the trial court, and from this ruling a writ of error was prosecuted to the Circuit Court of Appeals. The Appellate Court affirmed the order of the lower court sustaining said demurrer. Every word used by the judge who wrote the opinion in this case fits the instant case. While the Stebbins case was determined upon the pleadings and not upon evidence, that can make no possible difference, as the defendants in error in this case have not in their pleadings and evidence combined made as strong a showing that they are entitled to recover special damages as was made by the pleadings alone in the cited case. In sustaining the lower court the court of review said:

“In considering the question of special damage we must remember that the contract between the parties was in writing and contained no expression as to what the damages should be in case either party wholly failed to perform it. The general rule is that a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at

the time of making the contract. Under this rule the plaintiff in the present case could clearly recover in the proper forum the sum of \$675.00, which he alleges was the excess paid to the Layne & Bowler Co. for doing the same work that the defendant agreed to do. Parties, when they make contracts, contemplate performance, not breach; therefore, they do not usually say anything about consequences in case of breach by either party. In this situation the law establishes a rule by which it may be determined with reasonable certainty what the parties would have said, had they spoken in their contract. Thus arises the rule, above stated, that parties who break their contracts are to be held responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. The rule being thus established, the next question that arises is: How shall it be determined what the consequences were which the parties to a contract contemplated when they entered into the same? It has been decided that these consequences may be shown by oral evidence when the contract is in writing. It has also been decided that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account, if he fails to deliver the goods. As was said by Mr. Justice Willes in *British Columbia Saw Mill Co v. Nettleship*, L. R. 3 C. P. 499, 508:

“ ‘The knowledge must be brought home to the party sought to be charged under such circum-

stances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.'

"In this case the special condition would be that defendant entered into the contract in question, knowing that the plaintiff reasonably believed that, if the defendant wholly failed to perform the contract, he would be liable to the plaintiff for the difference between the value of the rice crop raised upon plaintiff's land and the value of the rice crop raised upon any adjoining land; this difference in the present case is \$3,500.00. One way of testing whether the defendant contemplated this consequence is to suppose that, had defendant been asked to agree to a clause in the contract that would make him liable in the way specified, would he have assented to the same? In our judgment there can be but one answer to this question: He would not. The foregoing principles of law are fully illustrated and sustained by the Supreme Court of the United States in *Globe Refining Co. v. Landa Cotton Oil Co.*, *supra*, where the cases, English and American, are cited.

"This case in our opinion fully sustains the ruling of the trial court. While the complaint shows that the defendant was in the business of sinking wells for the irrigation of rice lands, and knew that the plaintiff wanted the water to be pumped from the well in question to be used for the growing of rice, there is no showing in our opinion, that the plaintiff believed or contemplated, or that it



was in the contemplation of either party, that if the defendant failed to perform the contract within 20 days he would be liable for the difference in value between the rice crop of the plaintiff and any rice crop raised upon any adjoining land. The authorities upon the question of damages for the breach of contract are innumerable, but in the view we take of the case we are controlled by the case last cited."

*Globe Refining Co. v. Landa Cotton Oil Co.*, cited and followed in *Stebbins v. Selig*, was also decided upon the pleadings, but we must not forget the allegations of the complaint taken as facts make a much stronger case for the plaintiff than the pleadings and the evidence in the present case, and still the court held the plaintiff could not recover special damages. The contract was in writing; the action was brought to recover special damages for breach of contract to deliver crude oil, as well as general damages. In passing upon the allegations of the complaint, and particularly that part following the allegations of special damage, viz., "all of which facts, as above stated, were well known to the defendant, and defendant had contracted to that end with plaintiff," the Supreme Court used the following language:

“Whatever may be the scope of the allegations which we have quoted it will be seen that none of the items were contemplated expressly by the words of the bargain. Those words are before us in writing, and go no further than to contemplate that when the deliveries were to take place the buyer’s tanks should be at the defendant’s mill. Under such circumstances the question is suggested how far the express terms of a writing admitted to be complete, can be enlarged by averment and oral evidence; and if they can be enlarged in that way, what averments are sufficient.” . . . .

“The question arises, then: What is sufficient to show that the consequences were in contemplation of the parties, in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. *Messmore v. New York Shot & Lead Co.*, 40 N. Y. 422. See *Sawdon v. Andrew*, 30 L. T. N. S. 23. But, in the language quoted, with seeming approbation, by Blackburn, J., from Mayne on Damages, 2d ed. 10, in *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. Q. B. 473, 478, ‘it may be asked, with great deference, whether the mere fact of such consequences, being communicated to the other party will be sufficient, without going on to show that he was told that he would be answerable for them, and consented to undertake such a liability,’ citing Mr. Justice Willes, in *British Columbia & V. I. Spar, Lumber & Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 499, 500, in which he used the following language:

“‘I am disposed to take the narrow view that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. . . . If that (a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff’s trade should prove successful and without a rival) had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And though he knew, from the shippers, the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special conditions attached to it.’ ”

After quoting the last paragraph, the United States Supreme Court, by Justice Holmes, goes on to say, that the last words therein are quoted and reaffirmed by the same judge in *Horne v. Midland R. Co.*, L. R. 7 C. P. 583, 591; S. C. L. R. 8 C. P. 131. See also Benjamin, Sales, 6th Am. Ed. Sec.

872. It then proceeds to test the allegations of the complaint as follows:

“It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account if he fails to deliver the goods. With that established we recur to the allegations. . . .

“The allegation is that the fact that the plaintiff had contracts over was well known to the defendant, and that ‘defendant had contracted to that end with the plaintiff.’ Whether, if we were sitting as a jury, this would warrant an inference that the defendant assumed an additional liability, we need not consider. It is enough to say that it does not allege the conclusion of fact so definitely that it must be assumed to be true. With the contract before us it is in a high degree improbable that any such conclusion could have been made good.”

Counsel for plaintiff in error at all times objected to the introduction of any evidence as to special damages, because under the issues as framed it was not properly admissible, and all of such evidence went in over the objection of plaintiff in error. Defendants in error had in effect admitted that their first cause of action was not sufficient to sustain proof of special damages because it did not allege knowledge on the part of plaintiff in error that such



special damages would be sustained; but, at the eleventh hour, they were permitted to amend their first cause of action, over the objections of plaintiff in error. In this purported amendment, which was allowed to be filed by the court, they allege that plaintiff in error knew that the machinery was purchased for pumping water from a newly constructed well; that the well formerly used had been abandoned, and that the plaintiff had no other means of irrigation than by pumping from such new well. There is no allegation or evidence that the plaintiff knew how much land the defendants in error expected to irrigate, how much they had in alfalfa, whether such alfalfa was new alfalfa or old alfalfa, and no allegation by which it would be possible for plaintiff in error to compute how much, if any, defendants in error could or would be damaged by the breach of the contract to furnish the machinery in question. Take the amendment, paragraph 10½: It alleges that "the machinery contracted for was purchased to be used in pumping water from a newly constructed well on their land during the irrigation season of 1920 and subsequent years, to irrigate all the land hereinbefore described, which was then under cultivation, the said well being supplied by direct, continuous and abundant and

sufficient flow of water from the Columbia River to which it was in close proximity, and the said plaintiffs, relying upon the fulfillment of said contract by defendants, had from the time of entering into said contract, and by reason thereof, abandoned, and deprived themselves of all other means of irrigating said land, all of which said facts were well known to defendant, their agents, and servants at the time said contract was made and at all times thereafter." Read the amendment and enlarge on it as far as one's imagination will allow him to, and it is impossible to read into it an allegation that plaintiff knew that such land would take and require an unusual and extraordinary amount of water; that it was necessary to begin irrigating said land so much earlier than irrigation ordinarily commenced elsewhere, from which plaintiff in error could even remotely conjecture how badly defendants in error might be damaged by failing to get their water on their land at a certain fixed period. The testimony of Levi Austin, one of the defendants in error, goes no further than the allegations of the first cause of action and the amendment thereto allowed by the court. (Record, 68-70.)

In this connection it is interesting to note from the testimony of Jay Austin (Record, pp. 73-75),

that during the years 1916, 1917 and 1918, 1918 was the only year they got water on the land prior to May 1st. The usual time they got water to irrigate was on May 1st. The well did not come in prior to that time except during the year 1918. With water placed on the land by May 1st, they raised three crops. If they had the equipment installed by May 1st, 1920, they would have been able to raise the same amount of crops, practically as were raised in 1917, 1918 and 1919 on that land by getting water on there May 1st.

Mr. McIntosh, the engineer for plaintiff in error, informed the Austins the pumping machinery would be shipped on April 7th, and would reach the place of the defendants in error in about three weeks. He was told that would not be time enough, and the Austins were making arrangements for an electric plant. (Record, p. 82.) At and prior to the trial the defendants in error claimed that they had rescinded the contract on March 30th, 1920, and refused to have any further dealings with plaintiff in error. When the equipment was tendered on April 30th, the defendants in error refused to accept it.

One of the witnesses for the defendants in error, Eck Baughn, testified at the trial (Record, pp. 77, 78), that four times as much water was needed on the land of defendants in error as was required in the Yakima Valley; that is, four times the Yakima Government allowance of water is required to irrigate properly on the land of defendants in error on account of the soil conditions there. These conditions would certainly have been called to the attention of plaintiff in error at the time of making said contract if it was to be held liable for the loss of crops and permanent injury to the alfalfa land upon failure to deliver the pumping equipment at a fixed time. There is not a scintilla of evidence in this case on the part of defendants in error which goes to show that any special damages to be sustained by them for the breach of the contract, if it should be breached, was within the contemplation of either of the parties at the time it was entered into on September 25, 1919.

In the case of *Howard v. Stillwell and Bierce Mfg. Co.*, 139 U. S. 199, 35 L. Ed. 147, the seller brought suit to recover the balance of purchase price and the buyer counterclaimed for damages, both general and special. The trial court struck



out the defendant's plea which sought to recover profits expected to be derived from sale of flour which would have been manufactured, and excluded evidence offered in support of said claim, and its ruling was affirmed by the supreme court in a well reasoned opinion, citing a large number of cases, both State and Federal, and concluding with the following language:

“Tested by them, such losses were, in our opinion, rather remote and speculative rather than direct and immediate, resulting from the breach alleged. There was no stipulation in the contract that the defendants should make profits on flour from the wheat ground up by the machinery which the plaintiff contracted to furnish and erect in the mill. Nor were there any special circumstances attending the transaction from which an understanding between the parties could be inferred that the plaintiff was to make good any loss of profits incurred by a delay in furnishing and putting up such machinery, according to the terms of the contract.”

The defendants in this case were allowed to offset the general damages sustained by them as against the purchase price of machinery due to plaintiff, but the special damages were denied.

The case last cited and the case of *Globe Refining Co. v. Landa Cotton Oil Co.*, were followed in *E.*

*W. Bliss Co. v. Buffalo Tin Can Co.*, 131 Fed. 51. In this case the jury awarded the plaintiff judgment for special damages upon instructions of the court, which were duly excepted to by the defendant. Upon writ of error to the Circuit Court of Appeals, Second Circuit, this judgment was reversed, the court saying that the assignments of error based upon the exceptions to the rulings and instructions were well founded and hardly a debatable proposition. After reviewing the information which the seller had of the purpose for which the machinery sold was to be used by the buyer the court said:

“Under these circumstances, it cannot be said with any color of reason that the parties to the contract contemplated when it was made any liability of the defendant, in the event of a breach, beyond the usual consequences of the failure of a vendor to deliver property which he had agreed to sell.”

In *Hart-Parr Co. v. Barth Mfg. Co.*, 249 Fed. 629, delivery of metal patterns for use in casting farm tractor engines was unreasonably delayed, and the court held that, in the absence of prior notice of imminence of injury and consequential damage to seller by buyer, seller is not liable for

remote and inconsequential damages, by reason of use by buyer of wooden patterns during delay. The court also held unanimously that there was no error in the exclusion of evidence to prove such alleged loss and damage.

See also *Pusey & Jones Co. v. Combined Locks Paper Co.*, 255 Fed. 700, a well considered case decided by District Judge Geiger, of District Court of Wisconsin, and *Taber Lumber Co. v. O'Neal, et al.*, 160 Fed. 596, 602, from Circuit Court of Appeals, Eighth Circuit, both of which support the rule announced in the cases previously cited and discussed.

The last decision in the Federal Reports that we have been able to find dealing with the subject of lost profits constituting special damages is *Shelley v. Eccles*, 283 Fed. 361, No. 2 Advanced Sheets, dated November 30th, 1922. The cases cited by us are reviewed, discussed and distinguished in said decision. All this case holds is that the fourth amended complaint was sufficient to withstand the demurrer. A reading of said fourth amended complaint will show that its allegations were sufficient, as a pleading, to entitle the plaintiff to introduce evidence designed to hold the defendant liable for special damages, because he had been informed in

advance of the purposes and end the plaintiff intended to accomplish by the contract upon which the suit was based, and that it was understood at the time of contracting his profit would be due to the factory—an entirely different state of facts from the case now under consideration.

As to the proper rule for measuring damages in a case of this kind as laid down by our own State Supreme Court, we cite *Puget Sound Iron Works v. Clemmons*, 32 Wash. 36. In this case the lower court followed the advisory verdict of the jury in allowing special damages, but this judgment was reversed by the supreme court. The cause of action arose out of a breach of warranty of an engine. Upon the merits of the case the court said:

“There is no evidence at all in the record tending in any way to show that appellant knew the extent of defendant’s operations, the number of logs he was hauling, the number of men or machines he was working, or the kind or character of roads the logs were hauled over. These things would certainly have been mentioned at the time of the contract if plaintiff intended to give a warranty that the engine would do the work which defendant was going to put it to, and, in case of failure, to be liable for the loss of profits of a large logging company.”



Speaking of recovery of possible profits by reason of breach of contract of sale, the supreme court of Michigan, in *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, says:

“Very many questions similar to this might be put, and if the rule contended for by plaintiff in error were to prevail, in many cases the breach of a very simple contract, or failure in some part, might bring ruin upon the parties failing, where no such loss was contemplated. The adoption of such a rule would be extremely dangerous. If such consequences are to follow, it is much better that the parties, when contracting, expressly provide for such enlarged responsibility. This they may do, and the damages then may fairly and safely be said to have been contemplated by them at the time of entering into the agreement.

“Where the damages claimed, as in this case, largely exceed the contract price of the materials and labor to be furnished and performed by the party in default, we may well question the justice of such a conclusion in the absence of a clear showing that such a result was anticipated by the parties.”

In *Hooks Smelting Co. v. Planters' Compress Co.*, 72 Ark. 275, 79 S. W. 1052, plaintiff brought suit against defendant to recover the sum of \$520.87 for material delivered for use in operating a com-

pressor. The plaintiff was informed that the material was needed by a certain date, and that unless received the compress could not run, and great loss would result to the defendant, and plaintiff thereupon agreed that it would ship the material by the date specified, which was September 1st. The material was not shipped until the 30th of that month, and when received did not fit, and for those reasons was worthless, and as a result thereof, defendant's compress was stopped for several months, and defendant claimed it was damaged in the sum of \$7,322.50, for which it asked judgment. Plaintiff was asking judgment for \$520.87. Judgment was entered against plaintiff in the sum of \$5,450.00 for the damages sustained by defendant.

After discussing one of the rules of damages announced in the case of *Hadley v. Baxendale*, the Supreme Court of Arkansas, took occasion to refer to the obvious injustice of such a rule especially when applied to cases where the recovery of damages is far in excess of the purchase price of the material sold under a contract, and its language is appropriate in the instant case. We quote as follows:

“If thereupon a blacksmith or machinist is called in, and for the price of a few dollars undertakes

to make the repairs, but through some mistake or unskilfulness, the part supplied by him should fail to fit, requiring it to be remade, and entailing still further delay, would any court hold that the blacksmith or machinist could be held liable for all the damages entailed by the delay, when they were large, in the absence of a contract on his part to be thus liable, unless the notice and the circumstances under which he made the contract were such that he ought reasonably to have known that in the event of his failure to perform his contract the other party would look to him to make good the loss? Theoretically, under the third rule as stated in *Hadley v. Baxendale*, the blacksmith, if he had notice, would be liable; but we know of no decision that has gone to that extent, but there are many cases in which such exorbitant claims for damages have been denied by the courts on the ground that it would be clearly unjust to allow them."

Later on in the course of its opinion, the court said, upon the question of special damages:

"Now, where the damages arise from special circumstances, and are so large as to be out of proportion to the consideration agreed to be paid for the services to be rendered under the contract, it raises a doubt at once as to whether the party would have assented to such a liability, had it been called to his attention at the making of the contract, unless the consideration to be paid was also raised so as to correspond in some respect to the liability

assumed. To make him liable for the special damages in such a case, there must not only be knowledge of the special circumstances, but such knowledge 'must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.' In other words, the facts and circumstances in proof must be such as to make it reasonable for the judge or jury trying the case to believe that the party at the time of the contract tacitly consented to be bound to more than ordinary damages in case of default on his part."

This language is followed by the citation of a number of cases, some of which have already been called to the attention of the court by us in this brief. The verdict of the jury allowing the recovery by the defendant of special damages was set aside because the instruction on the measure of damages was too general, and the damages assessed by the jury were clearly excessive, and it would be very unjust to allow such a large amount of damages to stand.

Many other cases which we might cite to the court lay down the same rule as is laid down in the Michigan and Arkansas cases. By no stretch of the imagination can it be reasonably contended in



this case that any such damages as are claimed by the defendant in error in their first cause of action, to-wit, \$7,000.00, were in the contemplation of the parties at the time the contract was made, or that plaintiff in error could fairly be supposed to assume such liability as is claimed here, to-wit, the payment of \$7,000.00 as claimed by defendants in error, in consideration of the sale of a pumping equipment for which it was to receive \$2,430.00, in long drawn out payments, out of which the cost of manufacturing, handling, and freight, etc., were to be deducted, or the payment of \$3,088.00 according to the judgment of the court in this case. For the general damages amounting to \$574.00 plaintiff in error has at all times admitted its liability, but for more than that sum, it contends most emphatically it should not be held liable.

The proper way of testing whether the plaintiff in error contemplated the consequences claimed in this case, is to suppose that, had it been asked to agree to a clause in the contract that would make it liable in the way specified, would it have assented to the same? Let us assume that Levi Austin, one of the defendants in error, who made the contract in the case at bar, with Mr. Powell, salesman of

plaintiff in error, as is set forth in the testimony, informed said Powell that he and his brother owned the land described in the complaint, and expected to make a certain profit from the crops thereon during the following year, and on that account he desired that the plaintiff in error should insert a clause in the contract, assenting to its liability for any damages sustained by reason of non-delivery within the time specified, can it be for one moment contended that the plaintiff in error would have consented to the inserting of such a clause? We say "NO," especially in view of the fact that the land and the expected profits from crops raised thereon were not in any wise related to any of the matters concerning which the parties contracted. There is no reason for supposing that the plaintiff in error would ever have assented to the insertion of such a clause in the contract.

We especially invite the court's attention to the case of *British Columbia Saw Mill Co. v. Nettleship*, which is cited in *Stebbins v. Selig, supra*, and *Globe Refining Co. v. Landa Cotton Oil Co., supra*. In that case the plaintiffs delivered at Glasgow to the defendant several cases containing machinery for shipment on board the defendant's vessel, which machin-

ery was intended for the erection of a sawmill at Vancouver Island. The defendant knew of what the shipment consisted. On the arrival of the vessel at her destination, one of the cases which contained machinery, without which the mill could not be erected, could not be found, and the plaintiffs were obliged to send to England to replace the lost articles. The court held that the measure of damages was the cost of replacing the articles in Vancouver Island, plus 5 per cent upon the amount until judgment, by way of compensation for the delay, but refused to allow as damages any loss of profits from the operation of the mill which plaintiffs intended to erect. The opinions of Chief Justice Bovill and Justice Willes relate chiefly to the effect of knowledge on the part of the carrier of the use for which the machinery was intended. Justice Willes, in addition to what was quoted in *Stebbins v. Selig, supra*, said on this subject:

“He did not know that the part which was lost could not be replaced without sending to England. And, applying what I have before suggested, if he did know this, he did not know it under such circumstances as could reasonably lead to the conclusion that it was contemplated at the time of the contract that he should be liable for all those consequences in the event of a breach. Knowledge on the

part of a carrier is only important if it forms part of the contract."

Justice Willes then puts this case:

"Take the case of a barrister on his way to practice at the Calcutta bar, where he may have a large number of briefs awaiting him; through the default of the Peninsular & Oriental Company he is detained in Egypt or in the Suez boat, and consequently sustained great loss; is the company to be responsible for that, because they happened to know the purpose for which the traveller was going?"

From the authorities submitted, we believe we are justified in saying that a vendor will not be liable to the vendee for special damages consisting of the loss of profits in every case, where it appears that the goods were purchased for a particular purpose, and that the vendor knew that purpose. To create such extraordinary liability, and extraordinary it is, there must, in every case, be something in the terms of the contract, read in the light of the surrounding circumstances, which shows a plain intention on the part of the vendor to assume an enlarged engagement—a wider responsibility than is assumed by the vendor in ordinary contracts for the sale and delivery of goods. No such intention has been shown in this case, hence the defendants



in error should not be allowed to prevail on their first cause of action for special damages, and they should be forced to be content with the general damages which they proved and were allowed under their second cause of action. We do not agree with the trial judge in this case that the decisions upon the subject are apparently conflicting, which led him to conclude that it is a case on the border line. In every case where special damages have been allowed, special circumstances have been shown justifying their recovery. No such special circumstances have been shown in this case.

We have made a very careful investigation of the authorities, both state and federal, and believe that there is but one case in the state court, viz., *Harrington v. Blohm* (Ark.), 206 S. W. 316, which the Federal Court cites and refuses to follow in *Stebbins v. Selig, supra*, that would support the contention of defendants in error that the damages for the loss of crops are such damages as can be collected for a breach of a contract to furnish machinery to pump water to irrigate land, the crop having been damaged by lack of water. As stated by the writer of the opinion in *Stebbins v. Selig, Harrington v. Blohm* is not a parallel case. A reading of the last named case will readily show that proof

of the knowledge of the defendant of the extent of the damages which might be sustained was very strong, which is not true in the instant case. The same thing is true of the defendant in the *Stebbins v. Selig* case, and still the Circuit Court of Appeals held the defendant was not liable for special damages—only for general damages. This is the extent of the relief of defendant in error in the present case if adjudicated cases are of any value as precedents, and we believe they are. We are not contending that the defendants in error are not entitled to damages, but that they should be limited to general damages according to their testimony, and no recovery should be allowed them for special damages. The courts hesitate to allow damages for loss of crops in cases of this character as there are so many elements that enter into those brought for that purpose. They have allowed damages in the following cases:

1. Where the loss was due to lack of seed, as that is a natural consequence and in the contemplation of the parties when defective seed is sold.
2. For defective fertilizer where the poor quality of the fertilizer was the sole reason for the loss of the crop.

3. For ineffective chemicals used to destroy insectiverous life where the insects were the sole cause of the loss of the crop.

4. In irrigation cases where the contract was to furnish a certain amount of water and the contract was breached by furnishing a less amount or none at all, where other lands in the same locality of the same kind received sufficient water to mature a crop, but the courts made a distinction between contracts to furnish water and contracts to furnish machinery to pump water with.

We could cite a line of decisions to the court where a tractor was wrongfully taken resulting in loss of crop; where a mule was wrongfully taken and as a result the crop was lost; where an ox was wrongfully taken and as a result the man lost his crop; where slaves were wrongfully attached and the crop failed; where a team of horses was sold for the express purpose of putting in a crop, warranted to be sound and fit to put the crop in, whereas they were unsound and diseased, and only half a crop was put in, and damages were claimed for the crop that was lost, in all of which cases the court refused to allow special damages, but we feel that we have sufficiently sustained our position in

this matter that further argument or citation of authorities is wholly unnecessary.

*Cannon v. Oregon Moline Plow Co.*, 115 Wash. 273.

*Wiggins v. Jackson*, 43 L. N. S. 153 and note.

The English, Canadian, Federal and State decisions uniformly hold that recovery cannot be had for loss of crops unless it can be clearly shown that the seller was duly advised of the consequences of a breach of his contract, and with such understanding accepted the consequences, but defendants in error have not brought themselves within this rule.

We feel confident that this court will follow the wholesome rule laid down in *Globe Refining Co. v. Landa Cotton Oil Co.*, *supra*, *Stebbins v. Selig*, *supra*, and the other cases cited and discussed by us, and direct a judgment against plaintiff in error for \$574.00, and for no other or greater amount.

Respectfully submitted,

J. D. CAMPBELL,  
JOHN B. VANDYKE,  
JOSIAH THOMAS.

*Attorneys for Plaintiff in Error.*





# United States Circuit Court of Appeals

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For the Ninth Circuit

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FAIRBANKS, MORSE & COMPANY, a Corporation,  
Plaintiff in Error,

vs.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-  
Partners Doing Business Under the Firm Name  
and Style of AUSTIN BROTHERS: HELEN S.  
AUSTIN; and NETTIE M. AUSTIN, as  
Trustee, Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE EAST-  
ERN DISTRICT OF WASHINGTON, SOUTH-  
ERN DIVISION  
HONORABLE FRANK H. RUDKIN, JUDGE

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## BRIEF OF DEFENDANTS IN ERROR

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EUGENE E. WAGER  
STONE BANK BLDG., ELLENSBURG, WASHINGTON  
JAMES COLLINS LLOYD  
FIRST BANK BLDG., WHITE BLUFFS, WASHINGTON  
ATTORNEYS FOR DEFENDANTS  
IN ERROR

FILED

FEB 17

F. D. RICHMOND



# United States Circuit Court of Appeals

For the Ninth Circuit

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FAIRBANKS, MORSE & COMPANY, a Corporation,  
Plaintiff in Error,

vs.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-Partners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS: HELEN S. AUSTIN; and NETTIE M. AUSTIN, as Trustee,  
Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE EAST-  
ERN DISTRICT OF WASHINGTON, SOUTH-  
ERN DIVISION  
HONORABLE FRANK H. RUDKIN, JUDGE

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## BRIEF OF DEFENDANTS IN ERROR

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### STATEMENT OF THE CASE

Defendants in Error accept, in the main, the statement of the case made in the brief of Plaintiff in Error except as to the following facts:



That there was no modification whatever of the contract sued upon.

That any offers made by Plaintiff in Error, prior to the rescission of the contract, to supply a substitute pump, was for a pump of much smaller, and inadequate, capacity than that contracted for, being a four-inch pump whereas that contracted for was an eight-inch pump. (Record, p. 82).

That the defendants in error, depending upon the fulfillment of the contract sued upon, removed the irrigating plant which they had formerly used and sold the same to the plaintiff in error, who gave them credit for the said old plant, in the sum of \$200, on the contract for the new plant. (Record, p. 61). (Testimony of Levi F. Austin). (Record, p. 35). (Exhibit of Contract on which credit for old engine appears as \$200).

The testimony of Levi F. Austin (Record, p. 61) was to the effect that from the substitute plant, installed by defendants in error to salvage as much as possible of their crop, after the breach of the contract by plaintiff in error, that the defendants in error were able to begin irrigating on the 20th of May and that it occupied four weeks thereafter to

get the water over their land and that they completed the first irrigation of the said land between the 20th of June and the 1st of July of the year 1920.

In that section of country it is necessary to begin irrigating as early as the first of April and the defendants in error did not begin (in 1920) until May 20th. (Record, p. 62). And that in pervious years because of the late date at which they obtained water from their old plant they lost much of their crop but that in 1919 they had sunk a new well, which furnished the water earlier, and in which they had intended to place the new machinery contracted from plaintiff in error. (Record, pp. 60, 61 and 62).

## ARGUMENT AND AUTHORITIES

Plaintiff in error, in its brief, admits that the only question presented by the assignment of errors in this case "Is whether or not the defendants in error have made out a case entitling them to recover a judgment for special damages in addition to the general damages." (Brief, p. 31).

We understand that this admission includes the assignment of errors as to the amendment of the

complaint, which amendment, however, was entirely in the discretion of the trial court.

“The exercise of the power to permit amendments rests in the sound discretion of the trial court.”

21 R. C. L., p. 127, citing a long line of decisions from the Supreme Court of the United States and other appellate courts.

On page 3 of the brief of plaintiff in error a paragraph of the contract in issue is printed in italics to the effect that the said proposal contains all agreements pertaining to the property therein specified, there being no verbal understanding whatsoever, and when signed by purchaser and approved by an executive officer or local manager of Fairbanks, Morse & Co., becomes a contract binding parties thereto.

No question as to that feature of the contract was raised in the trial court and we do not conceive that it has any legal relation to the issue here, but that it relates only to the primary transaction of purchase and sale of the machinery.

In any event the parole evidence rule does not preclude the reception of parole evidence with reference to a matter evidenced by the writing, where

such evidence relates to a matter **in pais**, or is of such a character that it does not tend to vary or contradict the written instrument.

17 Cyc., Par. 2, p. 638.

“It is a recognized rule of construction that the court will place itself in the position of the parties who made the contract, as nearly as can be done, by admitting evidence of the surrounding facts and circumstances, the nature of the subject matter, the relation of the parties to the contract, and the object sought to be accomplished by the contract. \* \* \* Even though the contract is in writing, extrinsic evidence of the surrounding circumstances is admissible to aid the court to determine the intention of the parties.”

**Roller vs. George H. Leonard & Co.**, 229 Fed. at p. 618.

“How shall it be determined what the consequences were which the parties to a contract contemplated when they entered into the same? It has been decided that these consequences may be shown by oral evidence when the contract is in writing.”

**Stebbins vs. Selig**, 257 Fed. 230. (Cited in brief of plaintiff in error at p. 44).

The contention of plaintiff in error is solely that the damages claimed and recovered by defendants in



error, and which we shall denominate as special damages, were not such as were within the contemplation of the parties at the time the contract was made, and are too remote and speculative to be considered, and that the trial court erred in submitting the question of such damages to the jury and should have granted the motion of plaintiff in error to take such question from the jury.

As to the question of the proximate cause of the injury, suffered by defendants in error, the trial court submitted that to the jury on the authority of the decision of the United States Supreme Court in **Milwaukee & St. Paul Railway vs. Kellog**, 94. U. S. 469, 24 L. Ed. 256, and cited that case and quoted from it in the Court's instruction to the jury.

In the last mentioned case the Supreme Court say:

"The assignment presents the oft embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the court assumed that it was a question of law in this case. \* \* \* The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

Plaintiff in error in its brief, at page 33, says:

“The evidence in this case is susceptible of only **one reasonable inference** and therefore a question for the court under all of the authorities; that is, the evidence as to the special damages claimed by defendants in error in their first cause of action.”

We maintain that the inferences to be deduced from the facts in evidence, in the instant case, were for the jury and that it was the right and duty of the Court to submit, as the Honorable Trial Judge did, all of the facts to the jury.

“The weight and sufficiency of the evidence are for the jury, and therefore if there is evidence in the case which fairly tends to support plaintiff’s right to recover the court may properly refuse to take the case from the jury. \* \* \* **The inferences to be deduced from the facts in evidence are for the jury, who are at liberty to draw such inferences as are reasonably deducible therefrom,** and it is error for the court to draw inferences of fact from the evidence, or to influence the jury to draw certain inferences therefrom.”

38 Cyc., p. 1517 and authorities cited.

We understand the law, upon this point, to be that where there is a dispute about facts, where the credibility of witnesses is in issue, or where **it is doubtful**

what inference should be drawn from such facts as are proved, the matter is one for the consideration of the jury.

This view of the law is announced by the Supreme Court of Massachusetts in the case of **Litchfield v. Hutchinson**, (117 Mass. at p. 194) in which the court say:

“The only point argued by the defendants is, that it was erroneous in the presiding judge to decline to rule ‘that it was solely a question of law for the court whether the relation of counsel and client or professional advisor existed between Edwards and Learned in such a manner as to disqualify said Edwards from acting as a magistrate,’ and to submit this inquiry to the jury upon all the evidence. Where there is a dispute about facts, where the credibility of witnesses is in issue, or where it is doubtful what inference should be drawn from such facts as are proved, the matter is one for the consideration of a jury.” Citing **Gavett v. Manchester Railroad**, 16 Gray, 501, 505, and cases cited.

Upon this point the Circuit Court of Appeals, Eighth Circuit, speaking by Judge Phillips, in the case of **First National Gold Mining Co., of New York and Colorado vs. Altvater, et al.**, 149 Fed. at p. 397, say:

“No right minded, self asserting judge, with a proper sense of duty, will permit a judgment, subject to his supervisory control, to be entered which his intelligent conviction advises him is unsustained by sufficient evidence. While abstaining from an undue assumption of the province of the jury to determine where the truth lies in conflicting evidence, **and the reasonable inferences to be drawn therefrom**, as said by Mr. Justice Brewer, in **Patton vs. Texas & Pacific Railway Company**, 179 U. S. 660, 21 Sup. Ct. 275, 45 L. Ed. 361: ‘The judge is primarily responsible for the just outcome of the trial.

\* \* \* He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment.’ ”

The Supreme Court of Wisconsin in the case of **Zentner vs. Oshkosh Gaslight Company**, 105 N. W. 911, announce the rule on this point as follows:

“It is well established that if there is any credible evidence in the case **from which a reasonable inference may be drawn** in support of the claim of either party to the action, then the court can not assume to decide the controversy as a matter of law. Under such circumstances the question of fact must be submitted to and determined by a jury.” Citing other Wisconsin cases.



The Supreme Court of Indiana, in a case for damages for personal injury, entitled **Chicago & E. R. Co. vs. Thomas**, 55 N. E. 861, at p. 865 of the opinion say:

“In the last case cited, Judge Cooley says: ‘If the circumstances are such that reasonable minds may draw different conclusions respecting the plaintiff’s fault, he is entitled to go to the jury upon the facts.’ ”

The plaintiff in error, in its brief, at p. 34 thereof, also states that it, the plaintiff in error, “was justified in assuming that upon the hearing of the motion for judgment on the verdict of the jury the submission of the question of special damages would be considered the same as if the jury had not brought in its verdict at all, that is to say, the question would be decided by the court without any regard to the fact that the jury had brought in a finding holding the plaintiff in error liable for the special damages.” But the law is held to be, “that the jury, in their deliberations on the facts, are as independent of the court as the judge, in determining the law, is of the jury; and the consequence is that when a case has been submitted to the jury, there it must remain until it has been decided by them, or is with-

drawn from their consideration, not at the will and pleasure of the court, but under circumstances justified by the law.”

16 R. C. L., p. 184 and cases cited.

In the case of **Slocum vs. New York Life Insurance Co.**, p. 886, 57 L. Ed. (U. S.), 228 U. S. 361, the Court, speaking through Mr. Justice Van Devanter, say upon this point:

“Now according to the rules of the common law, the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a **venire facias de novo** is awarded. This is the invariable usage settled by the decisions of ages.

\* \* \* The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of the **venire facias de novo**, by an appellate court, for some error of law which intervened in the proceeding. \* \* \* This requires that questions of fact in common law actions shall be settled by a jury, **and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative.** \* \* \* It must therefore be taken as established \* \* \* that when a trial by a jury

has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided can not be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury can not be tried anew by a jury or otherwise, in any court of the United States."

And generally upon this point, as to the exceptions of plaintiff in error to the question of special damages being a matter for the consideration of the court only, and not for the jury, we quote from a very able opinion of Mr. Justice Sanborn, in the Circuit Court of Appeals for the Eighth Circuit, in the case entitled **Chicago G. W. Railway vs. Price**, 97 Fed. at pp. 427 and 428, as follows:

"The chief reliance of counsel for plaintiff in error is not upon their objections to the testimony. It is upon their contention that the court below should have instructed the jury to return a verdict in favor of the railway company. They insist that there were many questions presented by the evidence and

submitted to the jury which it was error for the court to refuse to decide, and that, if it had decided any one of them, the logical and unavoidable result would have been a peremptory instruction in favor of the company. The assignments of error which refer to this matter are numerous and voluminous. They assail various portions of the charge of the court, its refusal to grant numerous requests for instructions, and its failure to peremptorily instruct the jury in favor of the company. But when they are carefully analyzed, they all come to this: That for one reason or another the court erred because it did not direct a verdict for the railway company. Before entering upon a discussion of the questions which these assignments present, it is well to call to mind the established rules by which they must be determined. It is conceded that at the close of the evidence there is always a preliminary question for the Judge before the case can be properly submitted to the jury, and that is whether or not there is any substantial evidence upon which the jury can properly render a verdict in favor of the party who produced it, and that, if there is no such evidence, it is the duty of the court to direct the jury to return a verdict against him. But it is equally well settled that it is only when the evidence leaves the material facts admitted or undisputed, and only when these facts are such that reasonable men, in the exercise of an honest and impartial judgment can fairly draw but one conclusion from them, that the court may properly withdraw the case from the jury. If the evidence relative to the material facts is contradictory,



or if, reasonable men may well draw different conclusions, it is the duty of the court to submit the issues to the jury."

Citing numerous cases from the U. S. Supreme Court and U. S. Circuit Court of Appeals.

The United States Circuit Court of Appeals in the case of **Crookston Lumber Co. vs. Boutin**, 149 Fed. at p. 685, speaking through Adams, J., say:

"It is a well settled rule, recognized by the courts of the United States, that a question of law always arises at the close of the evidence in any case, whether there is any substantial proof warranting a verdict in favor of the plaintiff. In applying this rule, consideration most favorable to plaintiff must be given to all the evidence **and reasonable inferences arising therefrom**; the undisputed evidence must be so conclusive (1) that all reasonable men in the exercise of an honest and impartial judgment can draw but one conclusion from it and (2) that the court would in the exercise of sound judgment set aside a verdict returned in opposition to it."

Citing a large number of U. S. Supreme Court and U. S. Circuit Court of Appeals decisions.

In the case of **Morrison vs. The City of Madison**, 71 N. W. at p. 882, a case for damages for personal injury, the Supreme Court of Wisconsin say:

“If there was any room for honest differences of opinion among reasonable men of unbiased minds in respect to the inferences that should be drawn therefrom regarding the fact in issue, then it was for the jury, and not the court, **to draw the correct inference.** It is only when the facts are undisputed, and the **reasonable inferences therefrom** in regard to the ultimate fact in issue are all one way, that what is the proper inference is a question of law for the court to answer.”

We submit that the facts in the case were properly submitted to the jury, by the Honorable Trial Court, and that the authorities cited, **supra**, amply sustain and justify his action in that regard and we desire at this point to particularly point out the case of **Globe Refining Company vs. Landa Cotton Oil Co.**, 190 U. S. 540, 47 L. Ed. 1171, which is particularly relied upon by plaintiff in error, but which we maintain supports our position on this branch of the case and in which the Supreme Court say:

“It must not be forgotten that we are dealing with pleadings, not evidence, and pleadings which, as we have said, evidently put the plaintiff’s case as high as it possibly can be put. **There are no inferences to be drawn**, and therefore cases like **Hamond vs. Bussey**, L. R. 20 Q. B. Div. 79 do not apply. \* \* \* Whether if we were sitting as a jury, this would

warrant an inference that the defendant assumed an additional liability, we need not consider.”

Turning now to the main contention of plaintiff in error which is expressed in its brief at pp. 32 and 33 as follows:

“We respectfully submit that under the pleadings and the evidence in this case the defendants in error are not entitled to recover any special damages, because such special damages were not within the contemplation of the parties at the time the contract was made and are too remote and speculative to be considered.”

We respectfully submit that, aside from the fact that that issue has been determined by a jury and that their verdict and the judgment thereon is not vulnerable to successful attack, and should be affirmed—for the reasons stated, the position of plaintiff in error upon the said proposition (that the damages were not in the contemplation of the parties at the inception of the contract) is not tenable in the instant case and that the authorities cited by it (plaintiff in error) to sustain that proposition are all distinguishable, in their facts, from the instant case and are not analogous, in the legal effect of the facts stated, in any of them, to the facts in the instant case.

In the cases cited by plaintiff in error, to sustain their contention in this regard, it will be found that in each case the special circumstances were held to be unknown to the party breaching the contract, before entering into it, whereas in the instant case we maintain that the special circumstances were fully disclosed and that adequate damages were in the contemplation of the parties, at the time of making the contract, in event of breach.

The plaintiff in error, at or before the time the contract was entered into, was informed of the purpose, for which the machinery was required and of the peculiar conditions under which it was intended to be used, and the time when its installation was necessary in order to irrigate, and thereby save, the crops of defendants in error, and the agent of plaintiff in error was, before said contract was entered into, taken over the land which it was intended the said machinery should be used to irrigate, and it was part of the contract, between buyer and seller, that the said machinery must be delivered at Haven Station, near the said premises of defendants in error, by December 31st, 1919, in order that it might be installed and ready to begin irrigating the land of defendants in error by April 1st, 1920, and



that it would be necessary to have said machinery delivered by that time, in order to save said crop of defendants in error, and the defendants in error were assured by the agent of plaintiff in error that there would be no question, and no failure on the part of the plaintiff in error in making timely delivery of said machinery as afterwards expressed in the contract sued upon. (Testimony of Levi F. Austin, Record, pp. 58 and 71).

It was understood that the irrigating of this land was to begin April 1st, 1920, and that the said machinery would be delivered three months prior to this time, which interim was to be used in installing the same, and relying upon this assurance, of plaintiff in error, defendants in error sold their old pumping plant to plaintiff in error at the time of the purchase of the new plant and the price, \$200.00, was credited upon the contract for the new machinery, (Record, p. 61) and defendants in error thereby deprived themselves, as was well known to plaintiff in error, of all means of irrigating their said land, after the execution of the contract herein sued upon, except by means of the said new machinery contracted for with plaintiff in error.

The contract was entered into on the 25th day of September, 1919, and while it called for delivery by the 31st of December, 1919, the defendants in error did not rescind said contract until the 30th of March, 1920, thereby giving six months, to plaintiff in error, within which to furnish this machinery and during that time numerous letters were written by defendants in error to plaintiff in error, asking for information regarding the machinery and the shipment thereof, which was agreed to be delivered as aforesaid, **and their letters were never answered.** (Testimony of Levi F. Austin, Record p. 61).

Knowing that irrigation was to begin by the first of April, in order to properly irrigate the crops of defendants in error, plaintiff in error certainly knew that if irrigation was delayed until the latter part of June, in a dry, hot and arid country, there could be but one result, namely: That no crop could be raised on said land and that the roots of perennial crops growing thereon must be seriously injured by lack of water.

It is also to be noticed, from the testimony, that this corporation carried the class of machinery, contracted for in the contract in this case, in their reg-

ular stock in the State of Washington. (Testimony of C. R. Miller for defendants, Record pp. 79 to 81, and testimony of W. J. McIntosh for defendants, pp. 82 and 83).

As is said in **Boutin vs. Rubb**, 82 Fed. at p. 688.

“The circumstances demanded immediate and diligent action, not laggard performance nor shuffling effort to evade. All necessary facts were communicated to the appellants, which disclosed the emergency, and advised them of the need of immediate action.”

And in **Missouri Pacific Railway Co. vs. Hall**, 66 Fed. at p. 869, the court, through Judge Thayer, say:

“The knowledge that a party has, when he enters into an agreement, of the object which the opposite party hopes to accomplish, should be allowed to have some weight in determining whether the party thus informed discharged the obligation she assumed with reasonable diligence, and with due regard to the accomplishment of the purpose which the other party had in view.” Citing other authority.

In support of our contention, on this branch of the case, as to what damages, in the language used by the U. S. District Court, in **Hunt vs. Oregon Railway Company**, 36 Fed. at p. 488: “May reasonably be supposed to be in the contemplation of the parties

at the time of making the contract, that is, such as might naturally be expected to follow its violation." And as expressed by the Supreme Court of the United States in **Globe Refining Co. vs. Landa Cotton Oil Co.**, *infra*: "What liability the defendant may fairly be supposed to have assumed consciously, **or have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made,**" and bearing in mind, as said in **Hunt vs. Oregon Pacific Railway Co.**, *supra*, "Still it has been found impracticable to devise any definite and comprehensive rule applicable alike to the facts in all cases. Therefore in such case the measure of damages must to some extent depend on its own circumstances." We respectfully submit the following authorities:

As before stated, the plaintiff in error knew and the testimony discloses that the gasoline engine which furnished defendants in error all of the power for pumping, which they had used previous to the year 1920, had been taken apart, packed and sold by defendants in error to the plaintiff in error and credited by plaintiff in error on the contract for the new machinery, the subject of this action, as part of the purchase price thereof, and plaintiff in error knew that defendants in error had thereby deprived



themselves of any means for pumping water, for irrigation of their land, and relied therefor absolutely upon the fulfillment by plaintiff in error of their said contract.

A situation very analogous to that of the defendants in error, in the instant case, and in the respect just referred to, is disclosed in the case of **Central Trust Co. vs. Clark**, 92 Fed. at p. 297 (C. C. A. 8th Circuit), in which the court say:

“No notice to, or knowledge by, the Steel Company, at or before it made this contract, that this gear wheel and pinion (the subject of the action) **were ordered to replace old machinery**, or that the old machinery was badly worn or weak, or liable to break or to be insufficient to operate the railroad at its normal speed or that the income of the Cable Company was liable to be reduced \$181.00 per day, or at all, by its failure to complete the contract on January 3rd, 1893, was either proved or offered to be proved.”

The implication being, of course, in the opinion just quoted from, that if the fact of knowledge by defendant, of the defective nature of the old machinery, or that the new machinery was ordered to replace the old machinery which was imperfect, had been proved, that it would have furnished the ne-

cessary presumption of the contemplation by the parties of special damages in case of the breach of contract.

And in **McDonald vs. Kansas City B. & N. Co.**, 149 Fed. at p. 365, the Circuit Court of Appeals say:

“Proof of knowledge, by the defaulting party, at the time he makes the contract, of special circumstances which make damages, other than those implied by the contract and naturally flowing from it, the natural and probable effect of its breach, will warrant the recovery thereof.”

And we desire to particularly call the attention of the court to the case of “**The Saigon Maru**” in the U. S. District Court of Oregon, decided the 16th of August, 1920, by Wolverton, J., and reported in volume 267 Fed. p. 881, where the legal principles here involved are exhaustively discussed. In this opinion Mr. Justice Wolverton quotes, with approbation, from the Oregon case of **Hockersmith vs. Hanley**, 44 Pac. Rep., at p. 500 as follows:

“The intention of the parties is to be ascertained from a consideration of the contract, taken in connection with the surrounding circumstances and conditions of which they are cognizant; and if the circumstances and conditions are such as to make it apparent that the contract was entered into and

known by the contracting parties to have been consummated to enable one of them to serve or accomplish a particular purpose, the liability of the other for its violation will be determined, and the damages ascertained with reference to the effect of the breach, in hindering or defeating the contemplated object."

The testimony, to which we have already referred the court, as disclosed in the Bill of Exceptions, establishes the fact that not only did the plaintiff in error have four months in excess of the time stipulated in the contract, for the delivery of the machinery, but that said plaintiff in error also neglected to answer several letters written to it as to the shipment and status of this machinery prior to the recission, by defendants in error, of said contract.

Upon this point, of negligence, the Circuit Court of Appeals, in **Missouri District Tel. Co. vs. Morris**, 243 Fed. 481, have held that:

"Where defendant has negligently failed to perform a service which he has contracted to perform, the circumstances may be such that he will not be permitted to assert that he did not know the purposes for which plaintiff desired such service."

We also respectfully submit that plaintiff in error, in the instant case, is estopped and will not

be permitted to assert that it did not know the purposes for which defendant in error desired the machinery in question for this reason, to-wit: That the copy of the contract annexed to the Answer of plaintiff in error, as shown on page 35 of the Record, shows that the old engine, which, previous to the execution of said contract, had furnished all power used for pumping water for irrigation of land of the defendant in error, had been sold to plaintiff in error and credited on the face of said contract (Record p. 35), as part of the purchase price of the new machinery and the testimony of the defendants in error disclose the facts that this old engine had been taken apart and packed ready for shipment and held by them subject to the plaintiff in error and that thereafter they had no machinery or facilities upon the premises for pumping water, all of which was well known to plaintiff in error and the Answer of plaintiff in error in the third paragraph of the Second Affirmative Defense thereof (Record p. 29), alleges:

“That on or about the 2nd day of April, 1920, the defendant offered to furnish said plaintiffs with a temporary unit, consisting of engine and pump, and on the 9th day of April, 1920, it confirmed in writ-



ing the said offer to plaintiffs, stating it could furnish the plaintiffs a 25 H.P. type Y Oil Engine, similar in every respect to the one purchased by them, which it had in stock in Seattle, together with a four inch pump that could handle about 550 gallons of water per minute, which it also had in stock in Seattle, to be used by plaintiffs as a temporary equipment until defendant could procure from another source, on thirty days' delivery, a new pump similar to the one purchased. \* \* \* And that when the new pump arrived it could be substituted for the temporary pump installed. \* \* \* That defendant again in writing on the 21st of April, 1920, submitted to plaintiffs the proposition to furnish engine and pump from Seattle which would amply meet plaintiffs needs until the permanent pump arrived, which offer was also refused by plaintiffs; that had said plaintiffs accepted the offers of defendant, to furnish it the temporary pump and equipment as aforesaid, no damage would have been sustained by them."

Now we maintain that the sale of the old engine to plaintiff in error, leaving defendants in error absolutely without any facilities, thereafter, for irrigating their said land, and the facts alleged in the answer of plaintiff in error just quoted, absolutely establish knowledge, by plaintiff in error, of the special conditions and circumstances affecting this contract, even though it stood alone and was not sustained and reinforced by the other special cir-

cumstances alleged in the pleadings and proven upon the trial, and hereinbefore referred to, and estopp plaintiffs in error from claiming that these conditions and circumstances were not in the contemplation of the parties at the time the contract was entered into.

This contention is sustained, we think, by the case of **District Telegraph Co. vs. Morris**, (*supra*), and also by the late case of **Sven Nelson vs. Davenport**, 108 Wash. 259, in which the Supreme Court of this State of Washington at p. 264 of the opinion say:

“Respondent claims appellant’s whole case is at fault for the recovery of prospective profits because there was nothing in the testimony to show, or from which it can be inferred, that the consequences of which appellant complains were within the contemplation of the parties at the time the contract was made. Admit the rule of law to be as counsel contends, his attitude in attempting to apply it to this case overlooks the fact that, in the contract between the parties, which is set out in full in the complaint, there is a provision to the effect that appellant shall use care to discover and return any silver, dishes or wares that he may find in the cans, and in his answer there is a positive allegation of a breach of this provision in the contract, in that, from time to time during the life of the contract, appellant left respondent’s silverware in the hog pens to be lost and

destroyed, retained it for his own use, or gave it away, and that such conduct came to the knowledge of respondent, who on several occasions warned appellant in regard thereto. **Under such circumstances respondent is not in a position to contend he was unaware of appellant's business and its dependence upon the material covered by the contract."**

As to the cases cited by plaintiff in error we submit that upon examination it will be found that none of them support the contentions of plaintiff in error, in the instant case, and bear no analogy thereto in the vital points, of knowledge of the special circumstances, that entered into the contract when the same was made.

In **Hadley vs. Baxendale**, 9 Ex. 341 (Law Journal Vol. 23 p. 182), which plaintiff in error describes as a classic in the law, Baron Alderson, in stating the facts in the opinion says:

"Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiff to the defendant at the time the contract was made were, that the article to be carried was a broken shaft of a mill, and that the plaintiff was the miller of that mill. But how do these circumstances reasonably show that the profits of the mill must be stop-

ped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person; suppose that the plaintiff had another shaft in its possession put up or putting up at the time, and that he only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in delivery would have no effect upon the intermediate profits of the mill."

It is only sufficient to quote the above to refute any application of **Hadley vs. Baxendale**, as controlling, in the instant case.

In the case of **Pennypacker vs. Jones**, 106 Pa. 237, cited and relied upon by plaintiff in error, we find that the question of the contributory negligence of the defendant, who owned the mill and sued for damages, entered largely into the case and affected the result.

The Supreme Court of Pennsylvania, in the last mentioned case, state in the opinion as follows:

"He also found, however, that the delay of more than six days in starting the mill was not the fault of the defendant; that the cleaning and separating machinery was not to be, and was not, furnished by the defendants, but by the plaintiffs, and that the defect in the quality of flour produced was due in part to defects in the cleaning machinery, partly to



the defects in the bolting system, and partly to defects in the purifiers. \* \* \* The general rule of law is that the remedy shall be commensurate with the injury sustained. A scrutiny of the American cases leaves every agreement of the kind pretty much at large to stand on its own peculiarities."

The case last quoted from was decided by the Supreme Court of Pennsylvania on a review of the judgment entered upon the decision of a referee.

The case of **Corvin vs. Thompson**, 39 Canadian Supreme Court, was one for damages for failure to repair an engine used in a mill for cutting lath wood and the points determined can be best understood from the following part of the opinion:

"If the trial judge had found under the peculiar circumstances of this case the full sum he awarded, of \$427.00, as damages for loss of the use of the mill, I should not have been disposed, in the light of the language used by Blackburn, J., in **Elbinger Actien-Gesellschaft, Etc. vs. Armstrong**, (1) at page 477, to quarrel with the finding as a reasonable compensation for the loss of the use of the mill. But I am not able to follow him when he finds \$150.00 as such compensation, and then adds to it the actual expenses of wages and board of the men. The damages, whatever they were found to be, for the 'loss of the use of the mill' covered everything recoverable."

**Stebbins vs. Selig**, 257 Fed. 230, decided by the Circuit Court of Appeals for the Eighth Circuit, and largely relied upon, in the instant case, by plaintiff in error, in the facts bears no analogy to the instant case, although the learned counsel for plaintiff in error thinks otherwise. A vital and controlling point of difference is that the last mentioned case was decided upon demurrer to the complaint whereas the instant case was determined by the verdict of a jury and, as said by Mr. Justice Holmes in **Globe Refining Co. vs. Landa Cotton Oil Co.**, 190 U. S. 540, 47 L. Ed. at p. 1174: "It must not be forgotten that we are dealing with pleadings, not evidence, \* \* \* whether if we were sitting as a jury, this would warrant an inference that the defendant assumed an additional liability, we need not consider. It is enough to say that it does not allege the conclusion of facts so definitely that it must be assumed to be true." It should also be noted that in the last mentioned case of **Stebbins vs. Selig**, a dissenting opinion was filed by Stone, J., of the Circuit Court of Appeals.

The contract sued upon, in **Stebbins vs. Selig**, contemplated the execution of a most uncertain physical undertaking, involving much manual labor and

unknown, undiscoverable, and speculative physical difficulties, within a very limited period of time (20 days), and was a case in which it would be unreasonable to believe that a contractor would, in the regular course of business, contemplate assuming the risk of such special damages as were therein claimed. The case at bar is, in its circumstances and conditions, very different, and it is a universally accepted maxim in the law of damages that each case must largely be determined by its own circumstances.

“Still it has been found impracticable to devise any definite and comprehensive rule applicable alike to the facts in all cases. Therefore in such case the measure of damages must to some extent depend on its own circumstances.”

**Hunt vs. Oregon-Pacific Railway Co.**, 36 Fed. p. 481.

The case of **Globe Refining Co. vs. Landa Cotton Oil Co.**, 190 U. S. 540, 47 L. Ed. 1171, is largely relied upon by plaintiff in error as authority, in support of its contention, in the instant case.

The said case was decided on demurrer to the complaint and the Supreme Court, in that case, emphasized, in the opinion, the fact that it was deter-

mined upon pleadings, and not upon evidence, and that such being the case there were no such inferences to be drawn as a jury would be entitled to draw from the evidence in the case had it been allowed to reach a jury. We have already quoted from the opinion of the Supreme Court in this latter case wherein they distinguish between determining the case on the pleadings and what their decision might be had a jury passed on the facts and inferences properly deducible therefrom. In this latter case the Supreme Court also say:

“If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach. We have to consider, therefore, what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, **or have warranted the plaintiff reasonably to suppose that it assumed**, when the contract was made.”

At pages 51 to 53 of the brief of plaintiff in error reference is made to testimony as to the time when water was put upon the land in previous years, but all such evidence was fully qualified in the oral testimony and the jury took it all into consideration in reaching their verdict. It is a matter of common



knowledge that it is the warm weather of May that causes the damage to un-irrigated crops in the arid country in question and Levi F. Austin in his testimony, Record, p. 61, says: "Our lands were partly irrigated in 1920. We were compelled to put in another outfit, one we picked up at a different place, pump one place and motor another place, and we started irrigating about the 20th of May. We got over our lands between the 20th day of June and the first of July. It took us about four weeks to go over the place."

This testimony, just quoted, refers to the crop of 1920, upon which the damage occurred which is the subject of this suit. It shows that it occupies about four weeks to get water over the entire area of a tract of land of from eighty to one hundred acres when irrigation is begun so late in the season and that beginning at that late date, the 20th of May, they were practically unable to save any of their crop.

In the case of **Howard vs. Stilwell & Bierce Mfg. Co.**, 139 U. S. 199, 35 L. Ed. 147, relied on by plaintiff in error, the Supreme Court, speaking through Mr. Justice Lemar, conclude the opinion thus:

“There was no stipulation in the contract that the defendants should make profits on flour from the wheat ground up by the machinery which the plaintiff contracted to furnish and erect in the mill. **Nor were there any special circumstances attending the transaction from which an understanding between the parties could be inferred** that the plaintiff was to make good any loss of profits incurred by a delay in furnishing and putting up such machinery, according to the terms of the contract.”

The case of **Hart-Parr Co. vs. Barth Mfg. Co.**, also relied upon by plaintiff in error, is utterly inapplicable to the instant case, as the only reference to any claim for special damages is thus indefinitely referred to in the opinion:

“There was a similar condition of the testimony regarding the amounts which the Barth Company was entitled to recover on account of the work and material it furnished upon the right cylinder, especially upon the amount, character, and value of the materials furnished upon the right cylinder and upon the left cylinder, **which forbid judgment for the amounts allowed by the court without the verdict of a jury.** These conclusions compel a reversal of the judgment below and a new trial, and render it unnecessary to discuss other alleged errors.”

In **Shelly vs. Eccles**, 283 Fed. 361, No. 2 Advance Sheets, dated November 30th, 1922, the Circuit

Court of Appeals, Eighth Circuit, quote with approval from **Howard vs. Stilwell & Birce Mfg. Co. supra**, as follows:

“But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or remoteness, or where from the express or implied contract itself, or the special circumstances under which it is made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.”

We have endeavored to cover, and we think we have covered, very fully the authorities cited by plaintiff in error in support of their contentions in the instant case and we submit to this Honorable Court that there is not a single one of the authorities cited, by plaintiff in error, that is applicable to the facts in this case or that supports their theory of the law in the case.

We further respectfully submit that the trial court did not err, in submitting all of the facts testified to in this case to the jury and that it was the right and duty of the trial court so to do and that

it was entirely within the province of the jury to infer the facts as to what damages were in contemplation of the parties to the contract in the event of breach.

We further submit that there was ample testimony as to the special circumstances in this case to warrant the jury in drawing the inferences which it did.

Before closing we wish briefly to refer to the statements of plaintiff in error, in its brief at page 32, as follows:

“If the plaintiff in error is in effect an insurer of profits which may be made by its customers, when, without negligence on its part it fails to make delivery of machinery at the time ordered, it, as well as other manufacturers will hesitate to contract to deliver machinery at a definite date, or if it does so will be obliged to charge an exorbitant price in order to reimburse itself for losses that it must suffer through the occasional breach of its contract to deliver. If such damages under such circumstances are allowed, the result to business will be disastrous. The enormous damages that might ensue in the breach of the smallest contract may be so augmented that one would not be safe in doing any kind of business.”

These remarks, we submit, are inexact in this: That there probably are few cases in the books in-



volving analysis facts, that describe a greater degree of negligence than that indulged in by the plaintiff in error in the instant case, as the facts are indisputably proven that they had six months, before the rescission of the contract, within which to deliver machinery which they largely carried in stock within one hundred and fifty miles of the place where it was to be delivered, to-wit, in the City of Seattle, and even if it had to be brought from one of their more distant branch establishments, in another state, that the delay constituted gross negligence, and in the further fact that they failed and refused to answer the letters of defendant in error, during the said six months, inquiring as to the said machinery and its whereabouts and status and the time when it could be expected to be delivered.

As to the remaining remarks referred to at page 32, of the brief of the plaintiff in error, we regret to say that they appear to us to constitute a begging of the question.

For the reasons and under the authority cited, we respectfully submit to this Honorable Court that the decision of the trial court, in the instant case, should be affirmed.

EUGENE E. WAGER,  
JAMES COLLINS LLOYD,

Attorneys for the Defendants in Error.

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**United States Circuit Court  
of Appeals**  
**For the Ninth Circuit**

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FAIRBANKS, MORSE & COMPANY, A COR-  
PORATION, *Plaintiff-in-Error*

*vs.*

LEVI F. AUSTIN AND JAY R. AUSTIN, CO-  
PARTNERS DOING BUSINESS UNDER THE FIRM  
NAME AND STYLE OF AUSTIN BROTHERS;  
HELEN S. AUSTIN, AND NETTIE M. AUS-  
TIN, AS TRUSTEE, *Defendants-in-Error*

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE EAST-  
ERN DISTRICT OF WASHINGTON, SOUTH-  
ERN DIVISION

HONORABLE FRANK H. RUDKIN, JUDGE

**PETITION FOR REHEARING**

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**United States Circuit Court  
of Appeals  
For the Ninth Circuit**

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FAIRBANKS, MORSE & COMPANY, A CORPORATION,  
*Plaintiff-in-Error*

*vs.*

LEVI F. AUSTIN AND JAY R. AUSTIN, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF AUSTIN BROTHERS; HELEN S. AUSTIN, AND NETTIE M. AUSTIN, AS TRUSTEE,  
*Defendants-in-Error*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE FRANK H. RUDKIN, JUDGE

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**PETITION FOR REHEARING**

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We have carefully examined the majority opinion of this Honorable Court, as well as the dissenting opinion, and think that with propriety we may



ask the court to consider whether this case be not one in which it will be proper to grant a re-hearing to the plaintiff-in-error.

A reading of the majority opinion convinces us that its writer has disregarded or overlooked entirely certain portions of the testimony introduced at the trial over the objections of counsel for plaintiff-in-error, as well as the written proposal or contract upon which the first and second causes of action set forth in the complaint are based. No mention whatever is made of this written proposal or contract in the majority opinion, but Chief Justice Ross, in the dissenting opinion, has it in mind when he says that the sales agent of plaintiff-in-error was not by the record shown to have been authorized to incur on its behalf any liability.

While we admit that only in rare instances should counsel for clients, in an appellate court file a petition for re-hearing, we are firmly of the opinion that if ever any case merited a re-hearing this is one. Had the court not disregarded or overlooked entirely the vital, fundamental and essential principle of this case, we would not be presenting this petition. Feeling, however, that this is a case of far-reaching importance, not only to the plaintiff-in-error but also to all others in this juris-

diction engaged in the sale of machinery, we are entitled to the application of general law to the particular facts,—because if this case becomes a precedent it unsettles accepted principles and may have detrimental consequences beyond this important controversy. On the fundamental principle involved in this case, viz., the authority of the salesman of plaintiff-in-error to bind it in the light of the limitations and restrictions in the signed written proposal, there is a conscientious difference of opinion, as seen in the strong dissenting opinion of Judge Ross, which, to our mind, correctly applies the general law to the particular facts of the case. We are not satisfied that this case has received the thorough, patient, studious and conscientious attention and examination that cases usually have in this court, otherwise this foundation principle would not have been lost sight of entirely. Because therefore of the gravity and utmost importance of the principles of law applicable to this case, we submit the following grounds in support of our request for a re-hearing:

I

The limitation upon the authority of Powell, the salesman of the plaintiff-in-error, was brought home most clearly, pointedly and forcibly to the knowledge of Levi Austin, one of the defendants-in-error, by the written proposal or contract dated September 25, 1919, at the time it was made, by its express terms, and such a limitation was absolutely binding, and said written proposal thereby was made the sole basis of the contract of sale; and any knowledge obtained or communicated to said salesman by said Levi Austin which was not reduced to writing should not have been admitted by the trial court, nor should it have been used by this appellate court as its sole ground for affirming the judgment of the trial court in holding the plaintiff-in-error liable for special damages to the defendants-in-error, because the admission of said testimony is not sanctioned by any law; and the conclusion of this court thereon is contrary to law. This court, on page 2 of the majority opinion says:

“Before the execution of the contract Powell, the agent of the plaintiff-in-error, went over the lands of the defendants-in-error and discussed with them their problem of irrigation. He was told that their irrigation must begin by April 1st, and he assured

them that there would be no delay in delivering the machinery in due time. It was fully understood that in order to save the crops of defendants-in-error it would be necessary that the machinery be installed by the time so agreed upon."

We regret that the majority of the court did not quote verbatim from the testimony upon this point as Judge Ross did in his dissenting opinion, because if it had the words, "it was fully understood that in order to save the crops of the defendants-in-error it would be necessary that the machinery be installed by the time so agreed upon" would have been omitted. For our present purpose it is not necessary, however, that this testimony should be quoted by us, although for another purpose we may call attention to it later, but before this testimony became at all material we submit the court must decide what to do with the clause in the written proposal which reads as follows:

"It is expressly understood this proposal made in duplicate contains all agreements pertaining to property herein specified, there being no verbal understanding whatsoever, and when signed by purchaser and approved by an executive officer or local manager of Fairbanks, Morse & Co., becomes a contract binding parties thereto."

Clauses in contracts for the sale of machinery providing in substance that the acceptance of the



machinery upon arrival shall constitute a waiver of all damages in delays, have been upheld by the courts, both state and federal. To our minds there can be no distinction between such clauses and the clause in the contract or written proposal in the case at bar. See

*Lancaster Elec. Light, Heat & Power Co. v. Platt Iron Works*, 172 Fed. 314.

*Victor Chemical Works v. Hill Clutch Co.*, 152 Fed. 393.

There is no indication anywhere in the majority opinion that the particular clause above mentioned was noticed or considered at all,—a clause, we contend, upon which this case must stand or fall. It is true that we did not in our brief discuss this particular clause at great length, or cite authorities in support of our contention, because we felt that a mere statement of its language, followed by our objections to the introduction of any testimony as to the conversation had between Levi Austin and Powell, the salesman of plaintiff-in-error, and Assignment of Error No. 2, based thereon, would be more than sufficient to fully advise the court of our position. Before considering any other question in the case, this particular clause in the written proposal or contract should have been dealt with

and a disposition made thereof, either by deciding that it was binding or not binding upon the defendants-in-error. Judge Ross in the dissenting opinion says that by the record Powell is not shown to have been authorized to incur in behalf of his principal any such liability as is claimed here. The only testimony in the record which would show this fact would be the written proposal. It was incumbent upon the defendants-in-error to show Powell's authority; they made no effort or attempt to show such authority and right at the threshold they are met by the terms of the written proposal which Levi Austin signed for them, in fact, they base their two causes of action, one for general, and one for special damages, upon this written contract or proposal; they plead it in their complaint, they introduce it in evidence,—without making any allegation that it was signed by fraud, misrepresentation, undue influence, or over-reaching, or that they did not know what was in the instrument which was signed. They stand squarely upon this written proposal with the terms contained in the clause above mentioned, and upon it they must stand or fall in this court.

In the case of *Nielsen v. North-Eastern Siberian Co.*, 40 Wash. 194, our Supreme Court had occasion

to pass upon a written contract made with the plaintiff by the defendant company; the plaintiff contended that the contract was partly written and partly oral; he claimed that the agent of the company had told him he could land where he pleased during the period of his employment and be returned to an American port whenever he desired, while the written contract required him to remain with the defendant company until October, 1904. In passing upon the contract, the court used the following language which is applicable to the facts in the instant case:

“The contention that the contract was partly oral we do not think can be sustained. The negotiations with Perkins and Armstrong may have been matters of inducement, but the only contract was the written one which appellant signed and which respondent signed by its president and manager, Rosene. The conversations, promises and understandings, leading up to a written contract, do not constitute a part of the agreement. They culminate in the written instrument which is presumed to embody those matters upon which there has been a meeting of minds. \* \* \* \* \*

“The written contract being signed on behalf of the company by Rosene, this fact was evidence to appellant as to whom he should deal with concerning matters appertaining to his contract of employment. It would seem from the evidence that

Armstrong, upon whose statements appellant seems principally to rely as a part of his contract, was merely a man employed to solicit prospectors to engage in respondent's service. As such he would not have power to make or modify contracts for respondent."

In *Buffalo Pitts Co. v. Shriner*, 41 Wash. 146, the company brought suit to recover upon promissory notes given in payment of certain machinery, which were secured by mortgage upon said machinery. The defendant signed and delivered to an agent of plaintiff a written order for the purchase of a second-hand threshing machine, engine and appurtenances. This order was in the form supplied by agents of the company to intending purchasers, and embodied the following printed provision:

"This order is subject to the acceptance and approval of said company at its home office, and when so approved and accepted is a binding contract which no person has authority to modify or vary in any respect, or to waive any of its conditions except in writing approved by the management at the home office. . . . This form of contract is furnished in duplicate, see that you have a copy of it and keep it for reference. This warranty does not cover second-hand machinery sold. All conditions of this sale must appear on the within order, as no verbal agreements of whatever nature will be recognized or allowed."



This order was sent to the home office of the plaintiff, where it was accepted and machinery delivered. In his answer to the complaint to reduce notes to judgment and to foreclose chattel mortgage, defendant alleged affirmatively various guaranties and warranties concerning said machinery. At the trial plaintiff objected to the introduction of any evidence in support of defendant's affirmative defenses, and its objection was sustained by the trial court. Defendant then asked permission to amend its answer by alleging that he was induced to enter into the contract of purchase and to execute notes and mortgage by reason of the false and fraudulent representations made orally by respondent's agent as to the construction, character, material and quality of the machinery. This request was refused for the reason that it constituted no defense in view of the language of the contract. Judgment for plaintiff upon the note was entered. In sustaining the ruling of the lower court, the Supreme Court of Washington used this language:

“The rulings of the trial court as to the affirmative defenses and the requested amendments are the only questions presented for our consideration. We think these rulings were right. It is a general rule of law that statements made during the negotiations which culminate in a written instrument can not

be admitted to contradict or defeat such instrument. An exception, or apparent exception, to the rule arises in those cases where, by fraud, misrepresentation, undue influence, or overreaching, a party is induced to sign or execute a written instrument. But the evidence of such improper influences must be clear and satisfactory. In the case at bar, it is not contended that appellant did not know what was in the instrument he signed. Upon the oral argument his counsel, in answer to a question, stated that there was no such contention. He therefore knew that the written contract contradicted what he alleges the agent told and represented to him. The written order or application stated plainly that the warranty therein did not apply to *second-hand* machinery.

“It also contained the following statement: ‘All the conditions of this sale must appear on the written order *as no verbal agreements of whatever nature will be recognized or allowed.*’ Knowing of these statements in this order and contract, which he signed and which he states he carefully read, how can he be heard to say that the oral representations of the agent, made beforehand, induced him to sign said order and to subsequently execute the notes and mortgage in payment for the machinery? This instrument told him the company would not be bound by anybody’s representations except those contained in that identical document. He knew all this before the purchase was consummated or the notes or mortgages executed. Written instruments would be of little value if they could be overthrown upon such a showing as this.”

In the case of *Buckeye Buggy Co. v. Montana Stables*, 43 Wash. 49, the defendant ordered in writing from plaintiff, through salesman Van Sant, as shown by written order, two vehicles. This order contained the following language:

“All orders taken subject to approval of Home. No agreement or condition will be recognized unless written upon this blank. Everything must be written on this order as no verbal agreements or promises will be recognized.”

Upon suit to recover purchase price, defendant claimed an oral agreement with the salesman as to certain extras or addition to one of the vehicles. Plaintiff recovered judgment for the full amount sued. This was affirmed upon appeal the court saying regarding the introduction of parol testimony as to a contemporaneous oral agreement, in the absence of fraud or mistake:

“We are clearly of opinion that the order or contract can not be modified or varied by parol testimony as to contemporaneous oral agreement. The rights of the parties must therefore be determined by the written contract.”

Should the court feel that the decisions of our own state supreme court are not applicable or sufficient when applied to the facts of this case, we cite

with confidence that it will be accepted as authority upon the particular question to be decided, the case of:

*New York Life Insurance Co. v. Fletcher*,  
117 U. S. 519, 29 Law. Ed. 934.

This is a case arising upon insurance contract, but we are not aware that an insurance contract has any more sanctity or sacredness about it than any other contract, and it is governed by exactly the same rules and principles of law as other contracts. Fletcher sued the insurance company to recover \$10,000 upon policy of insurance on the life of his decedent, Alford, made in December, 1877. Alford died in September, 1880, and this action was brought by his executor to recover the above amount. As stated by counsel for the defendant-in-error in his brief, "the main question presented by the case is, whether the clause in the application and in the policy to the effect that no statements, representations, or information made or given by or to the person soliciting or taking the application, or to any person, shall be binding on the company, or in any manner affect its rights unless such statements, etc., be reduced to writing and presented to the officers of the company at the home office, in the application referred to, is such a notice to the applicant or



to the insured of the limitation of the powers of the soliciting agent, as exempts the company from responsibility and liability on the policy, when the solicitor is proved to have fraudulently inserted wrong answers and concealed the fact that he had done so from the applicant."

The declaration attached to decedent's statements and representations in support of his application for policy agreed they should be the basis of any contract between him and the company, and if they or any of them were in any respect untrue, the policy which might be issued thereon should be void, and that all moneys paid on account of the insurance should be forfeited; and further agreeing that inasmuch as only the officers at the home office had authority to determine whether or not a policy should issue on any application, and as they acted only on the written statements and representations referred to, no statements or representations made or information given to the persons soliciting or taking the application for the policy should be binding on the company or in any manner affect its rights, unless they were reduced to writing and presented at the home office in the application.

To the suit of the executor the insurance company pleaded the falsity of the answers and statements

contained in the assured's written application, which were warranted to be true. The reply of the executor was that the falsity of the statements was well known to the insurance company's agents who took the application, and witnesses were produced to testify as to what was said by the decedent at the time in which he called the attention of said agents to his physical condition and that he was not an insurable risk.

The trial court in substance charged the jury that:

"If they found that at the time of making the application the applicant told the agent that he had diabetes and referred him to his physician concerning it, and that such agent committed a fraud upon the assured by inserting false answers in the application and by suppressing the answers actually given, and by concealing from the assured what he had written in the application, and thereby induced him to sign it without knowledge what it contained, then the plaintiff was not estopped to recover."

The insurance company asked the court to charge the jury in the following language, which was refused:

"1. That it is competent for any party, corporation or individual employing an agent in the negotiation of a contract, *whether of insurance or otherwise*, to limit his powers, providing the limitation is

brought home to the knowledge of the other contracting party, otherwise the principal will be bound by the apparent as well as the actual powers of the agent; and as, in this case, the limitation was made a part of the contract between the parties, it was binding upon them.

“2. That the stipulation between the parties limiting the powers of the soliciting agent and providing that the contract should be based upon the written application, was binding upon the parties, and it was, therefore, immaterial what may have been said by or to the agent at the time of making the application, which was not reduced to writing and presented to the officers of the company at the home office in New York.”

Judgment was entered in favor of the executor and against the insurance company for the full amount of the insurance money, but on writ of error to the Supreme Court of the United States it was reversed, the court by Justice Field, saying:

“We are clear that the court below erred, both in refusing the instructions asked and in its charge to the jury in the particular mentioned.”

On December 22, 1913, the Supreme Court of the United States, in two cases, on writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review judgments which affirmed judgments of the Circuit Court for the Southern

District of Georgia in favor of plaintiffs in actions on policies of life insurance reversed and remanded them for new trials. These two cases are:

*Aetna Life Ins. Co. v. Moore, Admr.*, 231 U. S. 543; 58 Law Ed. 356;

*Prudential Ins. Co. v. Moore, Admr.*, 231 U. S. 560; 58 Law Ed. 367.

In the first of said cases, it is expressly agreed in the application for insurance that:

“No statement or declaration made to any agent, examiner, or other person, and not contained in the application, should be taken or construed as having been made to or brought to the notice or knowledge of said company, or as charging it with any liability by reason thereof.”

The second case cited also involved the knowledge of the local agent who prepared the application for policy of life insurance as ground for estopping the insurance company from insisting that the policy was void because of untrue statements in the application made a part of the insurance contract, where the policy provided that “No agent has power in behalf of the company, to make or modify this or any contract of insurance \* \* \* or to bind the company by making any promise, or making or receiving any presentation or information.”



Justice McKenna delivered the opinions of the court upon said writs of certiorari and held, in effect, that knowledge of the actual conditions and circumstances by the local agents who prepared the applications for policies of life insurance would not estop the insurance companies from enforcing a condition rendering the policies void if untrue statements were made in the application.

To the same effect, see the case of:

*Mutual Life Ins. Co. v. Hilton-Green*, 241  
U. S., 613; 60 Law Ed. 1202.

which went up to the Supreme Court of the United States on a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed judgment of the District Court for Northern District of Florida in favor of plaintiffs in an action upon policies of life insurance and which was reversed and remanded for further proceedings. The case was tried before a jury and the trial court instructed them that the knowledge of the agent of the insurance company would be the knowledge of the company and the insurance company would be estopped from setting up any false statement or misrepresentation of which it had knowledge before the issuance of the policy as a defense to the ac-

tion. At the conclusion of the evidence the counsel for the insurance company asked for a directed verdict which was refused. The U. S. Supreme Court, in disposing of the case, said:

“Considered with proper understanding of the law, there is no evidence to support a verdict against petitioner, and the trial court should have directed one in its favor.”

This is exactly what we claim should have been done in the case at bar. Under all, of the authorities, the plaintiff-in-error is entitled to have this court say, either that it has the right to place restrictions and limitations upon its salesman by proper clauses in its proposals when they are brought to the attention of parties dealing with them, or that it has no such right. In view of the positive decisions of the Supreme Court of the United States holding clauses of this kind enforceable, we cannot see how this Court can refuse to apply its rulings to the facts in the case. To hold the plaintiff-in-error for special damages in this case because of knowledge, if any, obtained by or known to the salesman prior to the execution of the contract, is tantamount to saying that no written notice can ever advise the purchaser of limitations placed upon salesmen by their principals. We do

not believe it was ever the intention of any court to hold this to be the law. Because of the failure of the court to pass upon this clause of the contract, we confidently submit that we are entitled to a rehearing in this case.

See also, *Maryland Casualty Co. v. Eddy*, 239 Fed. 477.

## II

The record discloses that the following facts and these only were brought to the attention of the salesmen of plaintiff-in-error before the contract was signed:

“Mr. Powell, the traveling agent of the defendant and Mr. Zane, the local agent at Hanford, came to our ranch relative to buying this pumping plant. Mr. Powell’s name appears on the contract, which is the first proposal we had. He was on or over our land prior to the execution of the contract and I went over the problem of irrigation with him. We went into details of the plant, that it was not satisfactory for even the acreage we had in then and we wanted to put in more acreage and went into details as to the different lifts and amount of water required, and he proposed this 25-horse power outfit connected to an eight inch pump would be exactly what we would want for this condition and the amount of water. We told him our problem there for irrigation and at this time the outfit we had

there was not satisfactory. We were not getting enough water and we told him we must have a change of some kind and asked what he would recommend to fit our purpose, and he proposed that we take at least a 25 horse power engine and connect it to this eight inch pump and later on if we cared to put in a larger pump this 25 horse power outfit would furnish the power. We told him at that time it would be necessary to have the outfit delivered in time on account of the water in the spring, and he assured us if we placed our order at that time there would be no question about the delivery of the machinery. We discussed the time the land should be irrigated and it was understood that we were to begin irrigation about the first of April. In going into the contract for the machinery to be delivered the 8th of December it would give us plenty of time to have the outfit installed and begin pumping by the first of April, and that was understood between us and the agent, and the date of the complete installation was definitely fixed as April first."

This is the testimony, and every word of testimony, on which the court must base its decree if it holds that plaintiff-in-error had in contemplation the possible loss that Austin Brothers might suffer should the contract be breached. The plaintiff-in-error's traveling agent was "on or over the land." There is no allegation or proof that he knew how many acres of land was in cultivation, how much of it was old alfalfa or new alfalfa. There is no



allegation or proof that he knew or was told that this locality required four times as much water as ordinarily used. There is no allegation, as has been well said by Chief Justice Ross, "relative to any future planting or the age of the alfalfa." In fact, there was no specific, definite information by which any person could have figured the loss by reason of plaintiff-in-error's breach of the contract.

We are confident that if you take every allegation in the pleading and every word of testimony of every kind relative to what was said and done at the time of submitting the proposition for a contract, it would be imposible for any living man to ascertain what damage, if any, Austin Brothers would suffer should the proposed contract be breached. Had Austin Brothers expected to recover upon breach of the contract for loss to their crops it was incumbent upon them to plead and to prove that at the time and prior to the inception of the contract plaintiff-in-error or its salesman with power to act, was told that they were intending to irrigate a certain definite number of acres which was planted to alfalfa, a portion of which was three years old and a portion of which was planted the preceding year; that they required a certain definite amount of water, which was four times as

much per acre as ordinarily required, and required it to go on to the land at a certain definite date, and failing to get it there on such date the young alfalfa would die and the old alfalfa would suffer so that it was probable the first cutting would be destroyed and the weaker plants would die out and the stand be thinned. And it is our belief that they should have gone even further and said with this water on the land at a certain definite date we will get so many tons of alfalfa to the acre, which will be worth approximately so many dollars. Had definite information of this kind been given plaintiff-in-error at the time of entering into the contract it would have been possible for it then to have estimated or to have had in mind the loss Austin Brothers might suffer by reason of the breach of the contract. In other words, the loss caused by the breach of the contract might have been in the contemplation of the parties, but we contend that not by the wildest stretch of imagination was it possible for the salesman submitting the proposition, and less for plaintiff-in-error to have in mind the damages claimed and allowed by the majority opinion in this cause.

What we have stated heretofore is the minimum of the allegations or statements that should have

been made to allow Austin Brothers to recover. In addition thereto they should have stated the probable market price of hay in the fall or what they estimated the market price would be in the fall. In other words, supposing that there had been some calamitous freak in the weather whereby all the alfalfa within a radius of twenty miles had been destroyed and the only alfalfa raised in that immediate locality was raised by Austin Brothers, and by reason thereof alfalfa was worth twice what it sold for this season, it could not thereby be contended that the parties could have had such matter in contemplation at the time they entered into the contract and they could not logically have been held for such advance price in alfalfa. Neither could they know by intuition that a portion of this alfalfa was young alfalfa that would die if it did not get water by a certain time. There is not one scintilla of evidence going to show that they knew a portion of the alfalfa was young alfalfa until the trial of this cause, and yet it appears that the permanent injury to the crop was largely on account of the young alfalfa sowed the preceding year. Levi Austin states. (St. 63.):

“We started irrigating the new land first; we knew the seeding died before we started to irrigate

the new land, first on the low land. It takes about two weeks on the lower lands. We got that wet and then we found that some of the new seeding was killed, so we immediately re-seeded that before turning the water on the hill because the ground was already wet. \* \* \* We had seeded about 15 acres additional land in the fall of 1919. \* \* \* The effect on that alfalfa for lack of irrigation in 1920 was about seven acres of the new seeding was killed; when we irrigated it the new alfalfa did not come up at all, of course, and when we irrigated the lower land first when we got on the high land on the other 25 acre place it was up in June and that land was gravel and had poorer soil than down below."

Taking every word of evidence of what happened prior to the time the contract was entered into as strongly against plaintiff-in-error as it is possible to put it, and no living man could estimate that losses would be as they proved to be at the time of the trial, and if the rule is as announced in *Hadley v. Baxendale*, 9 Exch. 341, that the injured party to a contract which is breached may recover special damages which arise from circumstances peculiar to the case when the circumstances were communicated to or known by the other party at the time of making the contract and may reasonably be supposed to have been in the contemplation of both parties, 8 R. C. L. 451, 459, we strenuously contend that there is no evidence in the record any-



where that the plaintiff-in-error had reasonable notice of the conditions which rendered the special damages which the defendants in error claim to have sustained and which they seek to recover in this action.

Referring to the letter of March 12, 1920, saying "the delay and uncertainty upon your part in this matter has cost us a lot of money and leaving us in a position where we do not know what to do" or the letter of March 30, "we have sixty acres of alfalfa which should be irrigated at once and in all probability with all of our efforts in installing an outfit at this late hour will lose the first cutting besides some permanent injury to the alfalfa." There is not a word or suggestion that they have young alfalfa which is liable to die, or alfalfa that was seeded the preceding year, and yet a large part of the damages allowed is for such young alfalfa which died and had to be re-seeded.

Again, it seems to us that the case of *Stebbins v. Selig*, 257 Fed. 230, presents a state of facts much stronger for plaintiffs than the facts in this case. In the *Selig* case the defendant was engaged in sinking wells and in furnishing pumps to pump the water and knew absolutely the necessity of getting the water on the land at a certain definite

time. He of necessity had much more detailed information than plaintiff-in-error had in this case. The only knowledge that is brought home to the plaintiff-in-error here is that one of its traveling agents had been "on or over the land," and Austin's statement that he needed water at a certain time, but no details as to the kind of crop grown or condition of the growing crop or probability of the young crop dying, all of which were known to the plaintiff-in-error in the *Selig* case. We do not believe the rule suggested by the majority in this case can be harmonized with the decision in the *Selig* case.

### III

We do not believe that the authorities cited in the majority opinion apply to the facts in this case, because it is assumed in their application that proper notice was given to plaintiff-in-error that it would be held liable for special damages if it failed to deliver said machinery within the stipulated time. Most of these authorities were not deemed of sufficient importance by the defendants-in-error to call them to the attention of the court in view of the particular facts of this case.

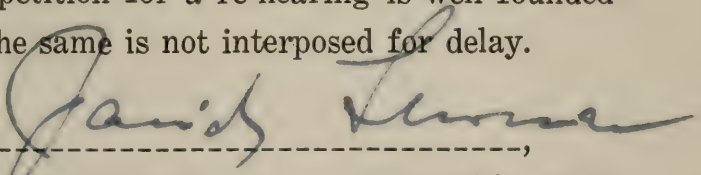
Attention is called by the majority opinion to the letters written by defendants-in-error to the plaintiff-in-error on March 12, 1920 and March 30, 1920. We do not see the applicability of these letters and for that reason they were not included in the bill of exceptions, as they had nothing to do with the question of special damages. This court, seems to be of the opinion that they are material because they furnish notice to the plaintiff-in-error of possible damages to the defendants-in-error. These letters, however, were written months after the execution of the contract. The cases all hold that where special damages are recoverable on account of breach of contract the knowledge thereof must be within the possession of the seller at the time of making the contract and not several months afterward.

Finally, we respectfully suggest that the court again consider the points taken in our brief filed in this case, as well as the additional points discussed in this petition for a rehearing.

WHEREFORE, upon the foregoing grounds, this plaintiff-in-error and petitioner respectfully prays this Honorable Court to grant it a re-hearing of said cause.

J. D. CAMPBELL,  
JOHN B. VAN DYKE,  
JOSIAH THOMAS,  
*Attorneys for Petitioner and  
Plaintiff-in-Error.*

I, Josiah Thomas, of counsel for the plaintiff-in-error, do hereby certify that in my judgment the foregoing petition for a re-hearing is well founded and that the same is not interposed for delay.

  
-----,  
*Of counsel for Petitioner and Plaintiff-in-error.*





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

MARY ROGULJ,

Appellant,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Appellee.

---

Transcript of Record.

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Upon Appeal from the United States District Court for  
the District of Alaska, Division Number One.

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**FILED**

DEC 13 1922

**F. D. MONCKTON,**  
CLERK.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MARY ROGULJ,

Appellant,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
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Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## **Names and Addresses of Attorneys of Record.**

J. H. COBB, Esq., Juneau, Alaska,  
Attorney for Appellant.

H. L. FAULKNER, Esq., Juneau, Alaska,  
Attorney for Appellee.

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In the District Court for the Territory of Alaska,  
Division No. One, at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Defendant.

### **Complaint.**

Comes now the plaintiff in the above-entitled action and for cause of action against the above-named defendant alleges:

1. That the defendant, the Alaska Gastineau Mining Company, is a corporation duly organized and existing under and by virtue of the laws of the state of New York, and doing business in the Territory of Alaska.

2. That the defendant company employs more than five men in carrying on its mining operations in Juneau Precinct, Territory of Alaska, and has so employed more than five men in its mining oper-



ations for more than three years last past; and was on the 30th day of November, 1915, employing more than three hundred men in its mining operations.

3. That said defendant company had not prior to the 30th day of November, 1915, elected to reject the provisions of an act passed by the legislature of the Territory of Alaska, entitled "An Act relating to the measure and recovery of compensation of injured employees in the mining industry of this Territory, and the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liabilities of employers to their employees in connection with such industry, and repealing all acts and parts of acts in conflict with this Act," approved April 29th, 1915.

4. That on the 30th day of November, 1915, one Peter Rogulj was, and for some time prior thereto had been, employed by the said defendant in and about its mine known as the Perseverance Mine, near Juneau, Alaska; that on the said 30th day of November, 1915, while [1\*] working in said Perseverance Mine aforesaid, the said Peter Rogulj received personal injuries by accident arising out of and in course of his employment aforesaid, which said injuries resulted in the death of the said Peter Rogulj on the said 30th day of November, 1915.

5. That the said Peter Rogulj was at the time of his death aforesaid unmarried but left surviv-

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\*Page-number appearing at foot of page of original certified Transcript of Record.

ing him his mother, Mary Rogulj, the plaintiff herein, who was at the time of the death of the said Peter Rogulj dependent upon him for her support; that at the time of the death of the said Peter Rogulj his father was not living; that the sum of twelve hundred dollars (\$1,200.00) is now due the plaintiff as beneficiary of the said Peter Rogulj under the provisions of the act of the legislature of the Territory of Alaska, mentioned in paragraph three of this complaint.

6. That the plaintiff served upon the said defendant a notice in writing setting forth that she is the beneficiary of the said Peter Rogulj, deceased; that the plaintiff has demanded of the defendant the sum of twelve hundred dollars (\$1,200.00) due her as such beneficiary aforesaid, but defendant has neglected and refused to pay the same or any part thereof.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of twelve hundred dollars (\$1,200.00), together with interest thereon at the rate of — per cent per annum from the — day of —, 1916, and for her costs and disbursements incurred herein, and a reasonable attorney's fee in prosecuting this action.

H. H. FOLSOM,  
Attorney for Plaintiff. [2]

United States of America,  
Territory of Alaska,—ss.

Matt Rogulj, being first duly sworn, on oath says: That he is the agent of the plaintiff in the

above-entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true; that he makes this affidavit for the reason that the plaintiff is absent from the Territory of Alaska, and that he knows of his own personal knowledge that all of the matters and things set out and alleged in said complaint are true.

MATT ROGULJ.

Subscribed and sworn to before me this 30th day of November, 1917.

[Notary Seal]

H. H. FOLSOM,  
Notary Public for the Territory of Alaska, Re-  
siding at Juneau.

My commission expires on the 15th day of March, 1921.

Filed in the District Court, District of Alaska,  
First Division. Nov. 30, 1917. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [3]

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In the District Court for the Territory of Alaska,  
Division No. One, at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Defendant.

**Answer.**

Comes now the above-named defendant, Alaska Gastineau Mining Company, and in answer to the complaint of the plaintiff on file herein, admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in paragraphs I, II, III and IV of said complaint.

II.

Referring to the allegations contained in paragraph V of said complaint, defendant admits that the said Peter Rogulj was at the time of his death unmarried, admits that his father was not living at said time; and denies each and every other allegation contained in said complaint.

III.

Defendant denies the allegations contained in paragraph VI of said complaint except that it has refused to pay the plaintiff the sum of \$1,200.00, which allegation defendant admits.

AND for a further and affirmative defense to said complaint, defendant alleges as follows:

I.

That the defendant is a corporation duly organized under the laws of the State of New York and doing business in Alaska and has paid its annual corporation license taxes for the current year; and was at all times mentioned herein engaged in mining in the Territory of Alaska and employed more than five men in connection with [4] its said mining operations.



## II.

That both the defendant and Peter Rogulj hereinafter mentioned were, at the times hereinafter mentioned, subject to all the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, 1915, commonly known as the Workmen's Compensation Act.

## III.

That on the 30th day of November, 1915, one Peter Rogulj, who was then in the employ of the defendant in connection with its mining operations, was killed while in such employment.

## IV.

That at the time the said Peter Rogulj entered the employ of the defendant, on or about the 1st day of September, 1915, he furnished this defendant with a statement containing the names of his beneficiaries in accordance with the provisions of section 9 of said Compensation Act, which said statement also contained the address of said beneficiaries.

## V.

That the name of the beneficiary designated in said statement by said Peter Rogulj was Mary Rogulj, his stepmother; and that the address of the said Mary Rogulj as set forth by the said Peter Rogulj in said statement was at Podaca, Austria.

## VI.

That on the 1st day of December, 1915, the same being within ten days from the date of the accident which resulted in the death of the said Peter

Rogulj, the defendant mailed to the said Mary Rogulj, at the said address, by registered mail, a notice of the death of the said Peter Rogulj, with a request that she file her claim for compensation if any; which said notice was prepared and mailed in accordance with the provisions of section 9 of the said Compensation Act. [5]

VII.

That no claim for compensation was filed with the defendant nor with anyone in its employ by the said Mary Rogulj nor anyone on her behalf within 120 days from the date of the death of the said Peter Rogulj, nor at any other time.

WHEREFORE defendant prays that this complaint be dismissed and that it have and recover of and from the plaintiff its costs and disbursements herein.

H. L. FAULKNER,  
Attorney for Defendant.

United States of America,  
Territory of Alaska,—ss.

G. T. Jackson, being first duly sworn, deposes and says: That he is the assistant manager of the Alaska Gastineau Mining Company, the defendant above named; that he has read the foregoing answer and knows the contents thereof and that the facts therein stated are true and correct as he verily believes; and that he makes this affidavit for and on behalf of the said defendant Company.

G. T. JACKSON.

Subscribed and sworn to before me this 1st day of December, 1917.

[Notary Seal]

H. L. FAULKNER,  
Notary Public for Alaska.

My commission expires Nov. 14, 1918.

Service of above answer admitted this 3d day of December, 1917.

H. H. FOLSOM,  
Attorney for Plaintiff.

Filed in the District Court, District of Alaska,  
First Division. Dec. 3, 1917. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [6]

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In the District Court for Alaska, Division No. 1,  
at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Defendant.

**Reply.**

Now comes the plaintiff by her attorney and for reply to the affirmative answer of the defendant, alleges:

1st. The defendant has no knowledge or information sufficient to form a belief as to the matters

and things alleged in the 6th paragraph of said affirmative answer and she therefore denies the same.

For further reply to the said affirmative answer, the plaintiff alleges: That at the time of the death of Peter Rogulj, her son alleged in the complaint herein, she was a resident of the then kingdom of Austria; that she had no knowledge of the said accident and owing to the state of war then prevailing throughout Europe and the interruption of all communications both by mail and cable, no means of obtaining such information within a 120 days' from and after such accident; that plaintiff had another son in the employ of the defendant, to wit: Matt Rogulj; that said Matt Rogulj immediately after the death of the said Peter Rogulj went to the defendant for the purpose of making claim in behalf of his mother, this plaintiff, for the compensation provided for by statute in such cases made and provided; that the defendant then and there admitted its liability to pay such compensation and promised and agreed with the said Matt Rogulj to pay the same so soon as he should obtain written authority to represent this plaintiff and to acknowledge a release and acquittance of said claim in behalf of plaintiff and the defendant expressly advised said Matt Rogulj, then acting in behalf of the plaintiff, that he need take no other [7] steps and need not consult an attorney, but all that was necessary to do to obtain the said compensation for plaintiff was to secure said power of attorney; that the said Matt Rogulj, as agent for



defendant, relied upon said promise of representation and was thereby lulled into security and accepted the advice of the defendant and did not consult an attorney nor take any further steps except to send for said power of attorney as directed by the defendant; that before information of said matters and things could be transmitted to the plaintiff and a power of attorney executed and returned to the said Matt Rogulj, more than 120 days has expired; that the plaintiff did execute the power of attorney aforesaid and transmitted the same as speedily as war conditions would permit to her said agent, Matt Rogulj, but when the same was received by the said Matt Rogulj and a request made for the payment of said moneys, the defendant declined and refused to pay the same for the reason that a written demand or claim therefor had not been presented within 120 days.

Plaintiff further alleges: That by its representations, promises, and advice aforesaid to the said Matt Rogulj, then acting in behalf of the plaintiff which actions were ratified by the plaintiff, the defendant expressly waived notice in writing of the claim of plaintiff for compensation; and further alleges that said promises, representations and advice was given for the express purpose of inducing the said Matt Rogulj to not present the claim in writing for said compensation, the defendant at the time purposing and intending if it should succeed in said fraudulent purposes, to plead the failure to give such notice as a defence and thereby defraud the plaintiff power of her

claim under the statute whereby the defendant is estopped from claiming or pleading the affirmative offense aforesaid.

And for a further reply to the said affirmative answer, plaintiff alleges: That if the defendant did mail by registered mail a notice [8] of the death of her said son as alleged in the 6th paragraph of said answer, then she alleges that the same was a vain and void act and did not and could not make it obligatory and binding upon the plaintiff to serve her claim for compensation within the 120 days for this; that because of the conditions of war then prevailing, it was a physical impossibility for a registered letter to reach her at her home in Podaco, Austria, giving her information of the death of her said son and of her duty under the law to serve the defendant for claim for said compensation within time to make and serve such claim within the said period of 120 days, all of which was well known to the defendant, and if the defendant did transmit the notices alleged in paragraph 6 of said answer, it was not done with the *bona fide* intention of complying with said law and to enable the plaintiff to put in said claim, but was done for the sole purpose of enabling the defendant to escape its just liability under the law.

WHEREFORE, plaintiff prays for judgment for the said sum of twelve hundred (\$1200.00) dollars, with legal interest thereon from November 30th, 1915, to date.

J. H. COBB,  
Attorney for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

Matt Rogulj, being first duly sworn, on oath deposes and says: I am the agent and attorney in fact for the plaintiff and make this verification for the reason that the plaintiff is a nonresident of the Territory of Alaska. The matters and things set up in the above and foregoing reply are true as I verily believe.

MATT ROGULJ.

Subscribed and sworn to before me this the 30th day of September, 1920.

[Notary Seal]

J. H. COBB,

Notary Public in and for Alaska.

My commission expires June 8, 1923.

Service for the above and foregoing reply admitted this — day of October, 1920.

\_\_\_\_\_,  
\_\_\_\_\_,  
Attorney for Defendant.

Filed in the District Court, District of Alaska,  
First Division. Oct. 2, 1920. J. W. Bell, Clerk.  
By V. F. Pugh, Deputy. [9]

In the District Court for the District of Alaska,  
Division No. One, at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Defendant.

**Demurrer to Reply of Plaintiff.**

Comes now the defendant Alaska Gastineau Mining Company by its attorney, H. L. Faulkner, and demurs to the reply of the plaintiff filed herein, and particularly to the second, third and fourth paragraphs thereof, for the reason that the matter contained therein and the allegations therein made are not a sufficient reply to the facts stated in defendant's answer, and for the reason that the same do not constitute a reply to said answer.

H. L. FAULKNER,  
Attorney for Defendant.

Filed in the District Court, District of Alaska,  
First Division. Mar. 3, 1921. J. W. Bell, Clerk.  
By V. F. Pugh, Deputy. [10]



In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Defendant.

**Order Sustaining Demurrer to Reply.**

This matter having come on for hearing, upon the demurrer of the defendant to the plaintiff's reply to defendant's answer, and the matter having been argued and submitted to the Court for decision on October 15, 1921, and the Court being fully advised in the premises,—

IT IS HEREBY ORDERED that the said demurrer be, and the same is hereby sustained, and the plaintiff is allowed one week from October 29, 1921, in which to further plead.

Done in open court this 31st day of October, 1921.

T. M. REED, \*  
Judge.

O. K.—COBB.

Filed in the District Court, District of Alaska,  
First Division. Oct. 31, 1921. John H. Dunn,  
Clerk. By ———, Deputy.

Entered Court Journal. No. "Q," page 388.  
[11]

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In the District Court for Alaska, Division No. One,  
at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING CO., a Corpo-  
ration,

Defendant.

**Amended Reply.**

Now comes the plaintiff by her attorney, and leave of the Court first being had, amends her original reply herein, so that the same shall hereafter read as follows:

Now comes the plaintiff, by her attorney, and for reply to the affirmative answer of the defendant, alleges:

Referring to paragraphs V, VI and VII of said affirmative answer, plaintiff denies all and *and* singular the allegations therein contained.

WHEREFORE she prays judgment as in her original complaint.

J. H. COBB,

Attorney for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

Matt Rogulj, being first duly sworn, on oath deposes and says: I have heard read the above and

foregoing reply, and the same is true as I verily believe. I am agent for the plaintiff, and make this verification for the reason that the plaintiff is a nonresident of, and is absent from the Territory of Alaska.

MATT ROGULJ.

Subscribed and sworn to before me this 3d day of November, 1921.

[Notary Seal]

J. H. COBB,

Notary Public in and for Alaska.

My commission expires June 8th, 1923.

Service admitted this Nov. 4th, 1921.

H. L. FAULKNER,

Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division. Nov. 5, 1921. John H. Dunn, Clerk. By ———, Deputy. [12]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Defendant.

**Judgment Nunc Pro Tunc.**

The above-entitled and numbered cause having

been heretofore on the 22d day of June, 1922, duly and regularly tried, and a verdict of a jury had, and judgment pronounced; and whereas, by inadvertence said judgment was not entered of record: Now on motion of the defendant for the entry of such judgment *nunc pro tunc*, it is ordered that the following judgment be entered by the clerk as of June 22d, 1922, to wit:

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Defendant.

### Judgment.

This cause came on regularly to be heard and both parties announced ready for trial; and thereupon came a jury of twelve good and lawful men, to wit, L. H. Smith and eleven others, who having been duly selected, impaneled and sworn, and having heard the evidence and having been instructed by the Court to return a verdict for the defendant, returned into court the following verdict, to wit: [13]



“United States of America,  
District of Alaska.

In the District Court of the United States for the  
District of Alaska, Division No. One.

No. 1698-A.

March Special Term, 1922.

MARY ROGULJ

vs.

ALASKA GASTINEAU MINING CO., a Corpora-  
tion.

**Verdict.**

We, the Jury empaneled and sworn in the above-  
entitled cause, find a verdict for the defendant.

Dated at Juneau, Alaska, this the 22d day of  
June, 1922.

L. H. SMITH,  
Foreman.”

It is therefore considered by the Court, and it  
is so ordered and adjudged, that the plaintiff take  
nothing by her action herein; that the defendant  
go hence without delay and have and recover of  
and from the plaintiff its costs herein to be taxed  
by the clerk, for which let execution issue.

Dated this the 22d day of June, 1922.

THOS. M. REED,  
Judge.

Filed in the District Court, District of Alaska,  
First Division. Oct. 25, 1922. John H. Dunn,  
Clerk. By ———, Deputy.

Entered Court Journal No. R, pages 395, 396.  
[14]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED that on the trial of the  
above-entitled and numbered cause the following  
proceedings were had:

The plaintiff to maintain the issues on his  
part, introduced in evidence the testimony of  
MATT ROGULJ, as follows:

**Testimony of Matt Rogulj, for Plaintiff.**

I am a stepson of the plaintiff and a brother to  
Pete Rogulj who was killed in an accident while  
in the employ of the defendant. At the time of  
the death of Pete Rogulj the plaintiff, who is a  
widow, was dependent upon Pete and I for her  
support and had been for some years. I know

(Testimony of Matt Rogulj.)

personally of his sending to her from his wages, as we frequently sent our money to her at the same time since about 1911. At the time of his death Pete Rogulj contributed from \$125.00 to \$150.00 per year to his stepmother's support, and I contributed about the same amount, sometimes a little more and sometimes a little less, according as we were employed. The money that we sent to her was her sole support except the product of a small kitchen garden which provided her with a few vegetables. Since the death of Pete I have been her sole support.

And thereupon the plaintiff rested.

And the defendant to maintain the issues on its part, read to the jury the following stipulation:

It is hereby stipulated and agreed by and between J. H. Cobb, attorney for plaintiff, and H. L. Faulkner, attorney for defendant, that the following facts may be admitted in evidence upon the trial [15] of the above-entitled cause and held to be established, to wit:

That on September 7, 1915, Pete Rogulj entered the employ of the Alaskan Gastineau Mining Company, and that upon said date he signed a certificate of employment and a statement under the provisions of section nine of the Workmen's Compensation Act of Alaska. That said statement was made by Peter Rogulj, and that he stated that he had a brother named Matt Rogulj, who was at that time working for the Alaska Juneau Mine, and he further stated that he, the said Peter Rogulj,

(Testimony of B. L. Thane.)

was not married and had no children, and that his father was dead and that he had a stepmother at that time living at Podaca, Austria, named Mary Rogulj, and that her age on September 7, 1915, was sixty-three. It is further stipulated that said statement was signed in accordance with the provisions of Section Nine, Chapter 71 of the Session Laws of Alaska, 1915, known as the Workmen's Compensation Act for Alaska, and that the said statement was signed in the presence of and witnessed by L. J. Reedy.

The defendant next introduced in evidence the testimony of B. L. THANE, which was as follows:

**Testimony of B. L. Thane, for Defendant.**

"That during the months of November and December, 1915, and January, February, March and April, 1916, I was general manager of the Alaska Gastineau Mining Company, the defendant herein; that during the months of November and December, 1915, and January, February, March and April, 1916, neither Mary Rogulj nor anyone in her behalf filed with me or served upon me any claim in writing for compensation for the death of Peter Rogulj, who was killed in the employ of the defendant Company in November, 1915."

The defendant next introduced in evidence the testimony of G. T. JACKSON, which was as follows:

**Testimony of G. T. Jackson, for Defendant.**

"My name is G. T. Jackson, and I was assistant manager of the Alaska Gastineau Mining Com-



(Testimony of G. T. Jackson.)

pany, the defendant herein, in November and December, 1915. That one of the duties of my office as assistant manager was to give notice, as required by law, to beneficiaries of employees killed in the employ of the defendant company. I was [16] assistant manager of the Alaska Gastineau Mining Company at the time Peter Rogulj was killed on November 30, 1915. On December 1, 1915, I mailed to Mary Rogulj at Padaca, Austria, a notice of the death of Peter Rogulj, which notice was as follows, to wit:

‘Juneau, Alaska, December 1, 1915.

To Mary Rogulj, Padaca, Austria.

This is to advise you that Peter Rogulj became deceased on the 30th day of November, 1915, as a result of an injury received while in the employ of the Alaska Gastineau Mining Company. You will take notice that all persons entitled to benefits because of the fact that the above-named employee was injured, and, as a result therefrom became deceased, under the laws of Alaska are required to serve notice upon the employer within one hundred and twenty (120) days after the date on which such employee became deceased, in accordance with the provisions of the laws of Alaska upon that subject, and that a failure to serve such notice within the time specified and in the manner specified, will result in depriving the beneficiary, failing to give such notice within such time and in

(Testimony of G. T. Jackson.)

such manner, of his or her rights to compensation under the laws of Alaska.

ALASKA GASTINEAU MINING COMPANY,

By G. T. JACKSON,  
Assistant Manager.'

That said notice was mailed at the United States Postoffice, Juneau, Alaska, by registered mail. That neither Mary Rogulj nor Matt Rogulj, nor anyone in behalf of Mary Rogulj, filed any claim for compensation with me as Assistant Manager of said Alaska Gastineau Mining Company at any time within one hundred and twenty (120) days after December 1, 1915."

**Testimony of Agnes Manning, for Defendant.**

The defendant next introduced the testimony of AGNES MANNING, who testified that on the second day of December, 1915, she was a clerk in the United States postoffice, at Juneau, Alaska, and that on said day the Alaska Gastineau Mining Company mailed a letter through said postoffice addressed to Mary Rogulj at Podaca, Austria. That [17] the said letter was registered by her. She further testified that the receipt for said registered letter was prepared by her and made out in her handwriting. Thereupon defendant introduced said receipt, which was identified by the said witness and received in evidence and marked Defendant's Exhibit "A."

The defendant thereupon rested.

**Testimony of Mike Juras, for Plaintiff.**

MIKE JURAS, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. COBB.

Q. Please state your name.

A. My name is Mike Juras.

Q. Mike—? A. Juras.

Q. (Spelling:) J-u—? A. (Spells:) J-u-r-a-s.

Q. Mike Juras. Where do you live now?

A. I live in the Basin boarding-house of the Alaska-Juneau.

Q. Speak so all these gentlemen can hear you. You are working you say, at the Alaska Juneau?

A. Alaska-Juneau mine.

Q. Of what country are you a native?

A. Austria.

Q. How's that? A. Austria.

Q. Austria. Do you know the plaintiff, Mary Rogulj—did you know her before you came to America? A. Yes.

Q. Know where she lived? A. Yes.

Q. Know her postoffice address? A. Yes.

Q. State whether or not you were born in the same neighborhood. [18]

A. Yes, I was born right close.

Q. Now, state to the jury what was Mary Rogulj's postoffice address.

A. The address was Zastroy, Dalmatia.

(Testimony of Mike Juras.)

Q. I will ask you to write that down.

(Witness writes: "P. O. Zastroy, selo Bodaca, Dalmatia, Austria.")

Mr. FAULKNER.—If the Court please, I object to this evidence as incompetent, irrelevant and immaterial. The question is not what her address was, but what the employee furnished the company.

The COURT.—I'll hear from the other side on that.

Whereupon plaintiff's counsel stated that he proposed to prove by said witness that Mary Rogulj the plaintiff, lived, and had always lived, at Podaca, Austria, that Podaca was not a post-office, but a mere country district; that her post-office address was, and always had been, "Zastroy, selo Bodaca, Dalmatia, Austria." After argument, the Court sustained the objection, to which ruling the plaintiff excepted. Plaintiff thereupon rested.

The Court thereupon instructed the jury to return a verdict for the defendant, to which plaintiff duly excepted. And the above and foregoing was all the evidence introduced or offered in the case.

And because the above and foregoing matters do not appear of record, I, Thomas M. Reed, the Judge before whom said case was tried, do hereby approve the foregoing bill of exceptions, certify that the same is correct, and order it filed and made a part of the record herein.



Done this the 22d day of July, 1922, and during the term at which said cause was tried.

THOS. M. REED,

Judge.

Copy of the foregoing bill of exceptions received this the 14th day of July, 1922.

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Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division. Jul. 22, 1922. J. H. Dunn, Clerk.

By \_\_\_\_\_, Deputy. [19]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY,  
a Corporation,

Defendant.

### **Assignment of Errors.**

Now comes the plaintiff by her attorney and assigns the following errors committed by the Court during the trial and in the rendition of the judgment in said cause, upon which she will rely on her appeal.

#### **I.**

The Court erred in sustaining the demurrer of

the defendant to the affirmative reply of the plaintiff setting up the waiver and estoppel as against the defendant to plead the special limitation of one hundred and twenty days within which to serve notice of the claim sued upon.

## II.

The Court erred in sustaining the objections of the defendant to the testimony of Mike Juras tending to show that Mary Rogulj, the plaintiff, lived and had always lived at Podaca, Austria, that Podaca was not a postoffice, but a mere country district; that her postoffice address was and always had been, Zastroy, selo Bodaca, Dalmatia, Austria.

## III.

The Court erred in instructing the jury to return a verdict for the defendant. [20]

And, for the above errors the plaintiff prays that the judgment in favor of the defendant in the above-entitled cause be reversed and the cause remanded with such directions as to this Court may seem proper.

J. H. COBB,

Attorney for Mary Rogulj, Plaintiff.

Filed in the District Court, District of Alaska, First Division. Oct. 21, 1922. John H. Dunn, Clerk. By ———, Deputy. [21]

In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Defendant.

**Petition for Allowance of Appeal.**

To the Honorable, the Judge of the District Court  
for Alaska, Division Number One:

Mary Rogulj, the above-named plaintiff, considering herself aggrieved by the judgment in favor of the defendant entered herein the —— day of June, 1922, appeals from said judgment to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, and having filed her assignment of errors herein, she prays the Court to make an order allowing said appeal and directing the clerk of this Court to transmit a transcript of the record herein to the said United States Circuit Court of Appeals.

J. H. COBB,

Attorney for Mary Rogulj, Plaintiff.

Upon consideration of the foregoing petition for allowance of appeal, it is ordered that appeal prayed for be, and the same is hereby allowed.

Dated this the 21st day of October, 1922.

THOS. M. REED,  
Judge.

Filed in the District Court, District of Alaska,  
First Division. Oct. 21, 1922. John H. Dunn,  
Clerk. By ———, Deputy.

Entered Court Journal, No. R, page 391. [22]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Defendant.

**Citation on Appeal.**

The President of the United States of America to  
the Alaska Gastineau Mining Company, a Cor-  
poration, and H. L. Faulkner, Its Attorney of  
Record, GREETING:

You and each of you are hereby cited and ad-  
monished to be and appear at a United States  
Circuit Court of Appeals for the Ninth Circuit,  
to be holden in the City of San Francisco, in the  
State of California, within thirty days from the  
date hereof, pursuant to an order allowing an  
appeal from the decree and judgment in the cause



lately pending in the said Court between Mary Rogulj, plaintiff, and you as defendant, then and there to show cause, if any there be, why the decree and judgment mentioned in said order should not be reversed, and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 21st day of October, 1922, and of the Independence of the United States the one hundred and forty-seventh.

THOS M. REED,  
Judge.

[Seal]

Attest: JOHN H. DUNN,  
Clerk.

Filed in the District Court, District of Alaska, First Division. Oct. 21, 1922. John H. Dunn, Clerk. By ————, Deputy. [23]

Service of the above and foregoing citation is admitted this the 21st day of October, 1922.

H. L. FAULKNER,  
Attorney for the Alaska Gastineau Mining Company, Defendant [24]

In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Defendant.

**Cost Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS,  
that we, Mary Rogulj, as principal, and Emery  
Valentine and ———, as sureties, hereby  
acknowledge ourselves to be indebted and bound  
to pay to the Alaska Gastineau Mining Company,  
a corporation, the sum of Two Hundred Fifty  
(\$250.00) Dollars, good and lawful money of the  
United States, for the payment of which sum, well  
and truly to be made, we hereby bind ourselves,  
our and each of our heirs, executors and adminis-  
trators, jointly and severally, firmly by these pres-  
ents.

The condition of this obligation is such, how-  
ever, that whereas the above-bound Mary Rogulj  
has appealed from the judgment in the the above-  
entitled cause on the — day of June, 1922, to the  
United States Circuit Court of Appeals for the  
Ninth Circuit to reverse the said judgment of the

said District Court of Alaska, Division Number One:

Now, if the said Mary Rogulj shall prosecute her appeal to effect, and pay all such costs and damages as may be awarded against her if she fail to make her plea good, then this obligation shall be null and void; otherwise to remain in full force and effect.

Witness our hands this the 21st day of October, 1922.

MARY ROGULJ,

By Her Attorney of Record,

J. H. COBB.

EMERY VALENTINE.

Approved as to form and sufficiency of sureties, this the 21st day of October, 1922.

THOS. M. REED,

Judge.

Filed in the District Court, District of Alaska, First Division. Oct. 21, 1922. John H. Dunn, Clerk. By ———, Deputy. [25]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1698-A.

MARY ROGULJ,

Plaintiff,

vs.

ALASKA GASTINEAU MINING COMPANY, a  
Corporation,

Defendant.

**Praecipe for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please make out a transcript of the record in the above cause, and include therein the following papers, and transmit the same to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco.

First. Complaint, filed Nov. 30th, 1917.

Second. Answer, filed Dec. 3d, 1917.

Third. Reply, filed Oct. 20th, 1920.

Fourth. Demurrer to reply, filed March 3, 1921.

Fifth. Order sustaining demurrer, filed Oct. 31, 1921.

Sixth. Amended reply, filed Nov. 5, 1921.

Seventh. Final judgment.

Eighth. Bill of exceptions.

Ninth. Assignment of errors.

Tenth. Petition for appeal and order allowing appeal.

Eleventh. Citation.

Twelfth. Bond.

Said transcript to be made in accordance with the Rules of the said Court of Appeals.

J. H. COBB,

Attorney for Mary Rogulj, Plaintiff.

Filed in the District Court, District of Alaska, First Division. Oct. 24, 1922. John H. Dunn, Clerk. By L. E. Spray, Deputy. [26]



In the District Court for the District of Alaska,  
Division No. 1, at Juneau.

United States of America,  
District of Alaska, Division No. 1,—ss.

**Certificate of Clerk U. S. District Court to Trans-  
script of Record.**

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached twenty-six pages of typewritten matter, numbered from one to 26, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, prepared in accordance with the praecipe of counsel for appellant, in cause No. 1698-A, on file in my office and made a part hereof, wherein Mary Rogulj is plaintiff and appellant and Alaska Gastineau Mining Company, a corporation, is defendant and appellee.

I further certify that said record is by virtue of an appeal and citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to the sum of Eleven and 85/100 (\$11.85) Dollars, has been paid to me by counsel for appellant.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 26th day of October, 1922.

[Seal]

JOHN H. DUNN,

Clerk.

By L. E. Spray,

Deputy.

[Endorsed]: No. 3942. United States Circuit Court of Appeals for the Ninth Circuit. Mary Rogulj, Appellant, vs. Alaska Gastineau Mining Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division Number One.

Filed November 10, 1922.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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MARY ROGULJ,

*Appellant,*

*vs.*

ALASKA GASTINEAU MINING  
COMPANY, a Corporation,

*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT FOR  
ALASKA, DIVISION NUMBER ONE.

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**Brief for the Appellant**

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J. H. COBB,  
*Attorney for Appellant.*





IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

MARY ROGULJ,

*Appellant,*

*vs.*

ALASKA GASTINEAU MINING  
COMPANY, a Corporation,

*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT FOR  
ALASKA, DIVISION NUMBER ONE.

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**Brief for the Appellant**

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STATEMENT OF THE CASE.

This was a suit brought by the appellant, in the Court below, to recover of the defendant compensation for the death of her son while in defendant's employ, under the Alaska Workmen's Compensation Act, Session Laws of Alaska, 1915, Chapter 71.

The complaint alleged facts showing the de-

fendant to be subject to the provisions of the Compensation Act, which were admitted in the answer. It then alleged that on November 30th, 1915, Peter Rogulj, a son of plaintiff, upon whom she was dependent, was killed while in defendant's employ, and prayed for judgment for \$1,200.00, the amount of compensation fixed in the Act. (Rec. pp. 1-3). The suit was filed November 30th, 1917.

The answer admitted all the material allegations of the complaint, except the dependency of the plaintiff upon the deceased, which was denied. (Rec. pp. 5-7). It then alleged an affirmative defence, which, omitting formal parts, was as follows:

## II.

"That both the defendant and Peter Rogulj hereinafter mentioned, were, at the times hereinafter mentioned, subject to all the provisions of Chapter 71 of the sessions laws of the Territory of Alaska, 1915, commonly known as the Workmen's Compensation Act."

## III.

"That on the 30th of November, 1915, one Peter Rogulj, who was then in the employ of the defendant, in connection with its mining operations, was killed while in such employment."

## IV.

"That at the time the said Peter Rogulj entered the employ of the defendant, on or about the 1st day of September, 1915, he furnished this defendant with a statement containing the names of his beneficiaries in accordance with the provisions of section 9 of said Compensation Act, which said statement also contained the address of said beneficiaries."

## V.

"That the name of the beneficiary designated in said statement by said Peter Rogulj, was Mary Rogulj, his step-mother; and that the address of the said Mary Rogulj as set forth by the said Peter Rogulj in said statement was at Pocada, Austria."

## VI.

"That on the 1st day of December, 1915, the same being within ten days from the date of the accident which resulted in the death of the said Peter Rogulj, the defendant mailed to the said Mary Rogulj at the said address, by registered mail, a notice of the death of the said Peter Rogulj with a request that she file her claim for compensation if any; which said notice was prepared and mailed in accordance with the provisions of section 9 of the said Compensation Act."

## VII.

"That no claim for compensation was filed with the defendant nor with anyone in its employ by the said Mary Rogulj nor anyone on her behalf within 120 days from the date of the death of the said Peter Rogulj, nor at any other time."

The plaintiff filed a reply denying for want of information the allegations of the sixth paragraph of the above answer, and affirmatively alleged:

"For further reply to the said affirmative answer, the plaintiff alleges: That at the time of the death of Peter Rogulj, her son alleged in the complaint herein, she was a resident of the then kingdom of Austria; that she had no knowledge of the said accident and owing to the state of war then prevailing throughout Europe and the interruption of all communications both by mail and cable, no



means of obtaining such infirmation within 120 days from and after such accident; that plaintiff had another son in the employ of the defendant, to-wit: Matt Rogulj; that said Matt Rogulj immediately after the death of the said Peter Rogulj went to the defendant for the purpose of making claim in behalf of his mother, this plaintiff, for the compensation provided for by statute in such cases made and provided; that the defendant then and there admitted its liability to pay such compensation and promised and agreed with the said Matt Rogulj to pay the same so soon as he should obtain written authority to represent this plaintiff and to acknowledge a release and acquittance of said claim in behalf of plaintiff and the defendant expressly advised said Matt Rogulj, then acting in behalf of the plaintiff, that he need take no other steps and need not consult an attorney but all that was necessary to do to obtain the said compensation for plaintiff was to secure said power of attorney; that the said Matt Rogulj, as agent for defendant, relied upon said promise of representation and was thereby lulled into security and accepted the advice of the defendant and did not consult an attorney nor take any further steps except to send for said power of attorney as directed by the defendant; that before information of said matters and things could be transmitted to the plaintiff and a power of attorney executed and returned to the said Matt Rogulj, more than 120 days had expired; that the plaintiff did execute the power of attorney aforesaid and transmitted the same as speedily as war conditions would permit to her said agent, Matt Rogulj, but when the same was received by the said Mat tRogulj

and a request made for the payment of said moneys, the defendant declined and refused to pay the same for the reason that a written demand or claim therefor had not been presented within 120 days.

Plaintiff further alleges: That by its representations, promises, and advice aforesaid to the said Matt Rogulj, then acting in behalf of the plaintiff which actions were ratified by the plaintiff, the defendant expressly waived notice in writing of the claim of plaintiff for compensation; and further alleges that said promises, representations and advice was given for the express purpose of inducing the said Matt Rogulj to not present the claim in writing for said compensation, the defendant at the time purposing and intending if it should succeed in said fraudulent purposes, to plead the failure to give notice as a defence and thereby defraud the plaintiff of her claim under the statute whereby the defendant is estopped from claiming or pleading the affirmative offence aforesaid." (Rec. pp. 8-11).

To this affirmative reply the defendant demurred (Rec. p. 13) and the demurrer was sustained. [Rec. p. 14).

The plaintiff thereupon filed an amended reply in which she admitted (by failing to deny) paragraphs one, two, three and four of the affirmative answer, and denied paragraphs five, six and seven. (Rec. p. 15). That is to say, she admitted that defendant was incorporated; that both plaintiff and Peter Rogulj were under the Compensation Act; that Peter Rogulj was killed while in the employ of defendant on November 30th, 1915, and "that at the time the said Peter Rogulj entered into the employ of the defendant, on or about the 1st day of

September, 1915, he provided this defendant with a statement containing the names of his beneficiaries in accordance with the provisions of section 9 of said Compensation Act, which statement also contained the address of said beneficiaries."

Plaintiff denied that the address of Mary Rogulj, as set forth in said statement, was Podoca, Austria, and the further allegations of paragraphs six and seven of the answer above set out, were also put in issue.

It will thus be seen that the issues to be tried were quite narrow, viz:

First, was the plaintiff dependent upon her son Peter at the time of his death?

Second, did the defendant within ten days after the death of Peter, mail to the plaintiff *at the address given in the statement furnished by Peter Rogulj* the notice required by the Act, so as to bar plaintiff's right of recovery?

There was no conflict in the evidence, which was very brief. The dependency was proved without dispute, (Rec. pp. 19-20) and plaintiff rested.

The defendant, to establish its affirmative defense, read the following stipulation as to certain facts, to-wit:

"That on September 7, 1915, Peter Rogulj entered the employ of the Alaska Gastineau Mining Company, and that upon said date he signed a certificate of employment and a statement under the provisions of Section Nine of the Workmen's Compensation Act of Alaska. That said statement was made by Peter Rogulj and that he stated that he had a brother named Matt Rogulj, who was at that time working for the Alaska Juneau Mine, and he fur-



ther stated that he, the said Peter Rogulj, was not married and had no children, and that his father was dead and that he had a step-mother at that time living at Podaca, Austria, named Mary Rogulj, and that her age on September 7, 1915, was sixty-three. It is further stipulated that said statement was signed in accordance with the provisions of Section Nine, Chapter 71 of the Session Laws of Alaska, 1915, known as the Workmen's Compensation Act for Alaska, and that the said statement was signed in the presence of and witnessed by L. J. Reedy." (Rec. pp. 20-1).

It next introduced the testimony of B. L. Thane, who was General Manager of the defendant Company from November 1st, 1915, to May 1st, 1916, and who testified that during said period neither Mary Rogulj nor any one in her behalf filed on served upon him any claim in writing for compensation for the death of Peter Mogulj. (Rec. p. 21).

It was proved by the testimony of G. T. Jackson, assistant Manager of the defendant, and by Miss Manning, clerk in the post office at Juneau, that on December 1st, 1915, a notice sufficient under the Compensation Act. was mailed by registered mail to Mary Rogulj, addressed to Podaca, Austria. (Rec. pp. 21-23). G. T. Jackson further testified that neither Mary Rogulj nor any one in her behalf filed with or served upon him any claim for compensation within 120 days after November 30th, 1915. Defendant then rested.

The plaintiff introduced the witness, Mike Juras, who testified in substance, that he was a native of Austria and knew Mary Rogulj before he



came to this country, and knew where she lived and her post office address; was born in the same neighborhood; that Mary Rogulj's post office address was "Zastroy, selo Bodaca, Dalmatia, Austria." Defendant's counsel objected to the above testimony as incompetent, irrelevant, and immaterial; plaintiff's counsel offered to prove further by the witness that Mary Rogulj lived, and had always lived at Podaca, Austria; that Podaca was not a postoffice, but a mere country district; that her postoffice address was and always had been "Zastroy, selo Bodaca, Dalmatia, Austria," but the Court sustained the objection of defendant, refused said offer and thereupon instructed the jury to return a verdict for the defendant, to all of which the plaintiff excepted. (Rec. pp. 24-25).

Judgment having been entered upon the instructed verdict the case is brought here upon the following

### Assignments of Error.

#### I.

"The Court erred in sustaining the demurrer of the defendant to the affirmative reply of the plaintiff setting up the waiver and setoppel as against the defendant to plead the special limitation of one hundred and twenty days within which to serve notice of the claim sued upon."

#### II.

"The Court erred in sustaining the objections of the defendant to the testimony of Mike Juras tending to show that Mary Rogulj, the plaintiff, lived and had always lived at Podaca, Austria, that Podaca was not a postoffice, but a mere country district; that her postoffice address was and always

had been, Zastroy, selo Bodaca, Dalmatia, Austria."

### III.

"The Court erred in instructing the jury to return a verdict for the defendant."

### ARGUMENT.

The Act under which this suit was brought, so far as material to the questions involved on this appeal, is as follows:

"Section 9. Every employee coming within the provisions of this Act, shall, either at the time he, or she, is employed, or thereafter, furnish his, or her, employer with a written statement showing the name or names of each and all persons that would be entitled to benefits under the provisions of this Act in case such employee should become deceased as a result of an injury received by him, or her, arising out of and in the course of his or her employment; such written statement shall bear the date upon which the same shall be furnished to the employer, and shall be signed by the employee. Provided, that, in cases where such employee is unable to write his, or her, name, his, or her, name may be affixed to such statement by another, and such employee shall make his, or her, mark in the manner customary in such cases, and such mark shall be made in the presence of at least one witness, who shall subscribe such statement as a witness.

"In all cases where there shall be a change of beneficiaries, or a change in the address of any beneficiary, the employee may furnish the employer with a new statement showing such change; such new statement to be so furnished shall in all respects conform and comply with the provisions hereof with

reference to the original statement to be furnished.

"In all cases where such statement, or statements, is or are, furnished the employer by the employer, the employer shall of such employee become deceased, as a result of an injury received in the course of his or her employment, notify each beneficiary named in the last statement of that fact; such notice shall be given by sending each beneficiary at the address given in the last statement furnished a copy of such notice by registered mail, and an envelope containing such notice addressed to each beneficiary at the address given in said last statement furnished, shall be deposited in the Post Office and registered, within ten days after such employee shall have become deceased.

"The notice to be so given shall be substantially in the following form: (Then follows form of notice).

"Any failure on the part of the employee to supply the employer with a statement as hereinabove provided shall not work a forfeiture of the right of his, or her, beneficiaries to benefits hereunder, but it shall relieve the employer of all obligation to give to any of the beneficiaries of such deceased employees notice of the fact the such deceased employee became deceased. In cases where the employer shall have been furnished with such statements and shall fail to notify the beneficiaries therein named as shown by the last statement furnished, within the time and in the manner herein provided, such beneficiaries who have not been notified have the right to notify the employer of their claim to benefits and file claims and prosecute actions or other proceedings for the recovery there-



of, notwithstanding the fact that such notice was not served as hereinafter provided within the period of one hundred and twenty (120) days from and after the time that the employee became deceased.

“Upon the trial of any issue relating to a beneficiary’s right to compensate under this Act, any statement furnished an employer, as hereinafove provided, may be offered in evidence by such employer and when so offered shall be received in evidence and shall be held to establish the fact that the persons named in the statement bore to the deceased the relation shown by such statement at the date thereof.

“In all cases where any person claims to be a beneficiary under this Act entitled to compensation because of an injury to an employee coming within its provisions, which resulted in his or her death, death, such beneficiary, or someone in his or her behalf shall within one hundred and twenty (120) days from and after th edeath of such employee serve a written notice upon the employer, which notice shall contain the name and address of the person claiming to be such beneficiary, the relationship existing between such beneficiary and the deceased, and if such beneficiary shall be either the father or mother of the deceased, such notice shall also contain a statement showing that such person was dependent upon the earnings of the deceased. Such notice shall be liberally construed and no claim for compensation shall be denied because of any defect in the notice, provided it appears that a notice was served with a bona fide intention to comply with the provisions of this Act. Such notice may be served by any person of legal age by deliv-



ering a copy thereof to the employer or the employer's agent, in person, or, by leaving a copy thereof at the employer's principal place of business within the Territory of Alaska with some person over the age of eighteen (18) years in the employ of such employer. If the employer cannot be found within the Territory and has no known agent or place of business therein, such beneficiary may serve such notice by publishing the same in one issue of any newspaper of general circulation published in the Judicial Division where the injury, out of which the compensation arose, occurred; except in the cases in this section otherwise expressly provided, no action or other proceeding to recover such compensation shall be brought or maintained, nor shall any claim for such compensation be filed or allowed as hereinafter provided unless such notice shall have been served in the manner and within the time herein provided."

First: The demurrer to the affirmative matter to the original Reply:

It is manifest that the requirement of the notice from the beneficiary to the employer of the claim is solely for and in the interest of the employer. No reason therefore, could be suggested why such notice may not be waived. Indeed in all the similar Acts passed in the states, in so far as we have examined them, before a failure to give a notice can operate as a defence, the employer must plead and prove he was injured thereby. That provision was omitted from the Alaska Act, it is true, and the point is not here involved. But it is clear from the record that the defendant knew all the facts of which it could have been informed by the making of

the claim; that is, it knew that Mary Rogulj was the mother and beneficiary of Peter, and was dependent upon him, and therefore, she was entitled to \$1,200.00. If the defendant then expressly waived this idle ceremony, can it be said that the failure of the plaintiff's other son to thereupon comply with it is to bar her relief? The law, we think, is well settled to the contrary.

"As a general rule, subject to the exceptions hereafter noted, a party may waive any legal right to which he is entitled. Rights growing out of contracts may, of course be waived, likewise rights conferred by statute, and constitutional rights may be waived by the party in whose benefit the rights accrue."

29 American & English Enc. Law, 2nd Edition p. 1107.

The exceptions to the general rule above stated, are, first, on grounds of public policy, as where there is a waiver of usury, or where the contract is illegal or immoral, and second, lack of jurisdiction. (Ib. 1107-8.) Manifestly the exceptions have no application here.

The rule has been applied to this defence under Workmen's Compensation Laws.

Roberts vs. Chas. Wolf Packing Co., 149 Pac. 413.

Conway Co. vs. Ind. Board, 118 N. E. 705.

Smith vs. Home Safety Boiler Co., 112 Atl. 516.

But the facts set up in the reply were not only a waiver but a complete estoppel in pais, against the defense set up in the answer. The defendant, by its conduct and representation, induced plaintiff's

agent, in reliance thereon, to fail to give the notice, but to take only the steps defendant had represented as solely necessary; namely, secure a written power of attorney, and then when the 120 days had expired without the notice being given, it plead the failure as a defence.

“Equitable estoppel in the modern sense, arises from the *conduct* of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts and his silence or negative omission to do anything. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel.” 2 Pom. Eq. 3rd Ed. p. 1416.

Second: The *second* and *third* assignments relate to the same error, and will be presented together.

The Compensation Act in question, in section one thereof, where the employer and the employee have not in the manner therein provided, elected not to operate under the statute, provides:

“The compensation to which such employee so injured, or, in case of his or her death, if death result from such injury, such beneficiaries, shall be entitled, and for which such employer shall be legally liable shall be as follows:” Then follows a schedule of amounts, including \$1,200.00 to the mother for the death of a son upon whom she was dependent.



Session Laws of Alaska, 1915, p. 146, and sub-section D, p. 147.

By this provision of the law, the right to compensation became vested in the plaintiff immediately upon the happening of the death of Peter Rogulj. The failure to file the claim then is a *defense*, the burden of proving which is upon the defendant. Bearing this in mind, let us examine the record in the light of the provisions of Section 9. (quoted above) as to facts admitted; the evidence on the facts disputed, and the evidence excluded under this issue.

It was admitted that defendant and Peter Rogulj were at the time of his death, operating as employer and employee, under the Compensation Act: It was admitted that at the time of his employment, Peter Rogulj furnished the defendant with a statement giving the name of Mary Rogulj as his beneficiary, and giving her *postoffice address*. The remaining facts necessary to make out the defense were in dispute. These facts were: First, that within ten days after Peter's death the defendant mailed by registered mail a notice to Mary Rogulj addressed to her at the post office address furnished by Peter. Second, that neither Mary Rogulj nor anyone in her behalf did, within 120 days from said death file, or serve a claim, as provided in Section 9.

*Defendant failed to produce and offer in evidence the written statement of Peter Rogulj. It proved that it sent by registered mail a notice addressed to Mary Rogulj, Podaca, Austria. Unless this was the address furnished by Peter, the failure of the plaintiff to file the claim within 120 days was*



*no defence.* With the proofs in this condition, the plaintiff offered to prove what the post office address of Mary Rogulj was and had always been, and that the actual address of the notice mailed was not her post office address, nor any postoffice address. This offer was denied by the Court. Had it not been denied the jury might well have concluded, indeed it would have been their duty to conclude under proper instructions, that the statement furnished by Peter Rogulj showed that plaintiff lived in Podaca (or Bodaca) Austria, and that her post office address was Zestroy, selo Bodaca, Dalmatia, Austria, and that defendant had failed to properly mail the notice to the plaintiff, which was the foundation of the sole defence it had. Had the evidence offered and excluded been admitted, we think it would have been the duty of the Court to have instructed a verdict for the plaintiff, for the evidence on the defence then would have stood, with an admission that Peter Rogulj furnished a statement containing the post office address of plaintiff; that the address was Zastroy, selo Bodaca, Dalmatia, Austria, and that defendant had mailed the notice to another and different address, and had therefore failed to put itself in a position to make the defence of a failure of the plaintiff to file her claim within 120 days from the date of the death of Peter Rogulj.

The instruction of the Court, however, to find for defendant, was error as the evidence stood. There was no evidence tending to show what post office address was furnished by Peter Rogulj,—simply that he furnished his mother's post office address, and stated that she lived in or at Bodaca,

Austria. A jury might possibly have inferred from this that Podaca, Austria, was her address. But it was not the province of the Court to conclusively infer this for them. For the jury, under proper instructions, might equally well have concluded that the defendant had failed to prove its defence. The argument may be made clearer perhaps, by an illustration.

Suppose the evidence had been that Peter Rogulj had stated that his mother lived in California, United States of America; that he had given defendant her post office address as Mary Rogulj, San Francisco, California, U. S. A., and that the defendant had mailed the notice to her addressed to Mary Rogulj, California, U. S. A. Under such proof could any court or jury say that defendant had made out its defence under the law? Clearly not.

The directed verdict was erroneous for another reason,—failure of the proof to show that no claim had been filed by plaintiff or by some one in her behalf. The only proof offered on this issue was the testimony of Thane, the General Manager of defendant and of Jackson, assistant Manager, that no such claim had been filed with them. There was no testimony however, that the notice of claim had not been filed with or served upon some other agent of defendant, nor that it had not been left at defendant's principal place of business with some person in its employ over the age of eighteen years.

The burden of making out its defence was on the defendant, and it failed.

We most respectfully but earnestly ask that the judgment below be reversed and the cause remained

for such further proceedings as the Court may think proper.

**J. H. COBB,**  
Attorney for Appellant.

No. 3942

United States

Circuit Court of Appeals

For the Ninth Circuit

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MARY ROGULJ,

*Appellant,*

VS.

ALASKA GASTINEAU MINING COMPANY  
(a corporation),

*Appellee.*

---

Upon Appeal from the District Court for Alaska,  
Division Number One.

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BRIEF OF APPELLEE.

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H. L. FAULKNER,  
*Attorney for Appellee.*

W. S. BAYLESS,  
*Of Counsel.*

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IN THE

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## BRIEF OF APPELLEE.

### Statement of the Case.

Peter Rogulj entered the employ of the defendant and appellee September 7, 1915, and on the same day signed a written statement, as required by the provisions of the Workmen's Compensation Act of Alaska, showing, among other things, that he was not married, that he had no children, that his father was dead and that he had a stepmother named Mary Rogulj, aged sixty-three, who was then living at Podaca, Austria. (Tr. of Rec., p. 20.)

On the 30th of November, 1915, Peter Rogulj died from an injury received while in the employ of de-

fendant, and on the 2nd of December, 1915, within ten days from the date of his death, defendant mailed a notice, in the form specified by the act, by registered mail, in the United States Post Office, Juneau, Alaska, to Mary Rogulj, plaintiff and appellant herein, at Podaca, Austria, the address given in deceased's statement, informing her of the injury and death of decedent and notifying her that all persons entitled to benefits on account of such injury and death were required to serve notice upon defendant within 120 days from November 30, 1915, in accordance with the provisions of the laws of Alaska upon that subject, and that failure to serve such notice within the time and in the manner specified would result in depriving the beneficiary of her rights to compensation. (Tr. of Rec., p. 22.)

Neither plaintiff nor anyone in her behalf filed with defendant within 120 days from November 30, 1915, as required by the act, any written notice stating her address, her relationship to Peter Rogulj, deceased, and that she was dependent upon the earnings of deceased. (Tr. of Rec., pp. 21, 23.)

Exactly two years later on November 30, 1917, plaintiff commenced this action, and in her complaint alleged, among other things, that she had served a notice in writing upon the defendant, setting forth that she was the beneficiary of Peter Rogulj and dependent upon him for support and that she had demanded of defendant the sum of Twelve Hundred Dollars due her as such beneficiary. (Tr. of Rec., p. 1.)

In its answer, defendant denied, among other things, that plaintiff was the beneficiary of Peter Rogulj, deceased, denied her dependency and denied that she had served upon defendant the written notice referred to in the complaint. For a further answer and affirmative defense, defendant alleged, among other things, that at the time Peter Rogulj, deceased, entered the employ of defendant, he furnished defendant with the statement above mentioned, and that within ten days from the date of the accident, defendant had mailed to plaintiff, in accordance with the provisions of the act, at the address given by the deceased in said statement, to-wit: Podaca, Austria; a notice of the death of Peter Rogulj, with a request that she file her claim for compensation, if any, and further alleged that no claim for compensation had been filed with defendant nor with anyone in its employ by plaintiff nor by anyone in her behalf within 120 days from the date of the death of Peter Rogulj nor at any other time. (Tr. of Rec., p. 5.)

Three years later plaintiff, on September 30, 1920, filed a reply admitting all the allegations of the affirmative defense in defendant's answer except the allegation that defendant had mailed to plaintiff its notice of the death of Peter Rogulj, which was denied. For a further reply to defendant's affirmative defense, plaintiff alleged, in substance, (1) that, owing to the existence of the state of war in Europe and the interruption of all communications with Austria, where she resided, she had no knowledge of



the death of Peter Rogulj, and no means of obtaining such information within 120 days from the accident; (2) acts on the part of defendant expressly waiving notice in writing of plaintiff's claim for compensation; (3) acts on the part of defendant whereby it was estopped from claiming or pleading as a defense the failure of plaintiff to give such notice. (Tr. of Rec., p. 8.)

Defendant's demurrer to plaintiff's affirmative reply having been sustained, plaintiff filed an amended reply admitting all the allegations of the answer except the allegation that Peter Rogulj, deceased, had designated Mary Rogulj, his step-mother, address Podaca, Austria, as his beneficiary in his statement which he furnished to defendant at the time he entered its employ (admitted in reply), the allegation that defendant had mailed its notice to plaintiff at such address, by registered mail, within ten days from the date of the accident (admitted in reply) and the allegation that no claim for compensation had been filed within 120 days, which allegations plaintiff denied. (Tr. of Rec., p. 15.)

At the trial in the District Court, plaintiff submitted testimony to prove her dependency and rested. (Tr. of Rec., p. 19.)

Defendant then submitted a stipulation that Peter Rogulj had furnished defendant with the above mentioned statement; also testimony (which was not contradicted) that the defendant, within ten days from the date of the death of Peter Rogulj, had mailed the notice required by the act to plaintiff

at her given address; also that the notice was properly registered; also that no claim for compensation was made by plaintiff to defendant within the 120 day period. Defendant then rested. (Tr. of Rec., pp. 20-23.)

Plaintiff then offered testimony tending to show that her address was different from the address given by Peter Rogulj in his statement to the defendant. (Tr. of Rec., p. 24.)

The court sustained defendant's objection to this testimony and then instructed the jury to return a verdict for defendant. The jury accordingly having returned a verdict for the defendant and judgment having been entered thereon, this appeal was taken. (Tr. of Rec., p. 25.)

Plaintiff in her assignments of error raises three questions for decision here relative to the rulings of the trial judge in

(1) Sustaining defendant's demurrer to plaintiff's reply.

(2) Excluding testimony that plaintiff's address was different from that given by Peter Rogulj, deceased, in his statement to defendant.

(3) Instructing the jury to return a verdict for the defendant.

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### Argument.

The first assignment of error relates to the order of the court in sustaining defendant's demurrer to plaintiff's affirmative reply.

The reply admitted failure on the part of plaintiff to serve upon defendant, within 120 days from November 30, 1915, the date of the death of Peter Rogulj, the notice of plaintiff's dependency and claim for compensation, but alleged as an excuse, first, the existence of a state of war in Europe and the interruption of all communications, which prevented the notice from being served; second, waiver of the notice by the defendant; and, third, estoppel by defendant to claim or plead as a defense such failure to give the notice.

The Alaska Workmen's Compensation Act, Sessions Laws of 1915, Chapter 71, Section 9, page 156, provides:

“In all cases where any person claims to be a beneficiary under this Act entitled to compensation because of an injury to an employee coming within its provisions, which resulted in his or her death, such beneficiary, or someone in his or her behalf shall within one hundred and twenty (120) days from and after the death of such employee serve a written notice upon the employer, which notice shall contain the name and address of the person claiming to be such beneficiary, the relationship existing between such beneficiary and the deceased, and if such beneficiary shall be either the father or mother of the deceased, such notice shall also contain a statement showing that such person was dependent upon the earnings of the deceased. Such notice shall be liberally construed and no claim for compensation shall be denied because of any defect in the notice, provided it appears that a notice was served with a bona fide intention to comply with the provisions of this Act. Such notice may be served by any person of legal age by delivering a copy thereof

to the employer or the employer's agent, in person, or, by leaving a copy thereof at the employer's principal place of business within the Territory of Alaska with some person over the age of eighteen (18) years in the employ of such employer. If the employer cannot be found within the Territory and has no known agent or place of business therein, such beneficiary may serve such notice by publishing the same in one issue of any newspaper of general circulation published in the judicial division where the injury, out of which the right to compensation arose occurred; Except in the cases in this section otherwise expressly provided, no action or other proceeding to recover such compensation shall be brought or maintained, nor shall any claim for such compensation be filed or allowed as hereinafter provided unless such notice shall have been served in the manner and within the time herein provided."

A notice of dependency and claim for compensation is similar in principle to a notice of the time, place and cause of injury.

Under particular statutes, notably Employers' Liability and Workmen's Compensation Acts, the general rule is that the giving of the prescribed notice is a condition precedent to the existence of the cause of action unless excused by circumstances which the statute permits to operate as an excuse.

17 Corpus Juris, page 1196 (No. 45) 2, and cases cited.

"Since the right of action is wholly statutory and must be taken with all the conditions imposed upon it, the burden being upon plaintiff to bring himself within the requirements of the statute, and although a contrary view



has been taken, it is generally held that a provision in the statute creating the right requiring an action thereon to be brought within a specified time is more than an ordinary statute of limitations and goes to the existence of the right itself, the right given being one to sue within the specified time, and not otherwise. Accordingly, no action brought after the expiration of the specified time can be maintained, and except as provided by the statute, no exception can be permitted to excuse delay. The court cannot add a saving clause or create an exception where the statute contains none \* \* \*."

17 Corpus Juris, page 1235, 1236 (No. 83) 2.

See also 8 R. C. L., page 805, No. 83.

The Harrisburg, 119 U. S. 199.

Amer. R. Co. v. Coronas, 230 Fed. 545, L.R.A. 1916E 1095;

Partee v. St. Louis, etc., R. Co., 204 Fed. 972, 51 L.R.A. (N. S.) 721;

Giersch v. Atchison, Topeka, etc., R. Co. 16 A. L. R. 470;

Dochoff v. Globe Construction Co., 180 N. W. 414;

Schild v. Pere Marquette R. Co., 166 N. W. 1018;

Kalucki v. American Car & Foundry Co., 166 N. W. 1011;

Cooke v. Holland Furnace Co., et al., 166 N. W. 1013;

Dane v. Michigan United Traction Co., 166 N. W. 1017.

In the case of *In re Murphy* (Mass. 1917) 115 N. E. 40, the court said:

"Notice in writing must be given by the employee before he can recover under the Act,

and the necessity of such a notice is not a mere technicality. It is essential to his rights. Doubtless the legislature could have dispensed with this condition or could have insisted upon a mere oral notice. The statute expressly requires a written notice. The giving of such a notice is a part of the plaintiff's case and the burden of proof rests upon him; it is not a matter of defense resting upon the employer \* \*."

The claim for compensation will be rejected if the notice of the claim is defective since the provisions of the statute must be substantially complied with.

Welch v. Waterbury (N. Y. 1912) 100 N. E. 426;

Fidelity & Casualty Co., et al., v. Industrial Accident Commission of California (Cal. 1918) 170 Pac. 1112.

The first affirmative allegation of the reply, in substance, is that owing to the state of war prevailing throughout Europe at the time of the death of Peter Rogulj (November 30, 1915) and the interruption of all communications both by mail and cable, plaintiff had no knowledge of the accident and no means of obtaining such information within 120 days from such accident at her residence in Austria, which, later on in the reply, she designates as Podaca, Austria.

The court will take judicial notice of the fact that no state of war existed between the United States and Austria, or between the United States and any other country in 1915. The United States declared

war against Germany in April, 1917, and against Austria in the fall of 1917, about two years after the death of Peter Rogulj. Communication with Austria in 1915, while somewhat slower than in times of peace, was possible and more or less regular.

However, under the act, it was not necessary for plaintiff personally to notify defendant of her dependency upon the deceased and to claim compensation within 120 days from November 30, 1915, since anyone could file such a written notice and claim in her behalf. Her stepson Matt Rogulj was in Juneau, Alaska, where the defendant's office and principal place of business in the Territory are located, not only at the time of the accident, but also during the pendency of the case in District Court, verified plaintiff's pleadings herein and could have served the notice.

In the case of *In re Gorski*, 116 N. E. 811, brought under the Massachusetts statute, which provided that no proceedings for compensation should be maintained unless the claim for compensation was made within six months after the occurrence of the injury, or within six months after death, and that failure to make a claim within this period should not bar proceedings if occasioned by mistake or other reasonable cause, the court refused to allow the claim of a widow residing in Poland for compensation for the death of her husband in 1914, since the claim, due to the interruption of communi-

cations caused by the war in Europe, was not made within the statutory period, saying:

“Neither ignorance of the law nor simple absence from the country constitute reasonable cause for failure to make the claim seasonably. That is settled. McLean’s case, 223 Mass. 342, 111 N. E. 783.”

In *Poccardi v. Ott*, 98 S. E. 69, decided by the Supreme Court of West Virginia in 1919, the claim of a beneficiary of a deceased employee was held to be barred for failure to give the required notice within the statutory period, although the claim, after having been signed by the beneficiary, who resided in Italy, was delayed in transmission on account of the existence of a state of war, not between the United States and Italy, but between them and the Central Powers. The court said:

“On the first proposition, it is sufficient to answer that the statute makes no exception in favor of delayed applications; it is imperative. To entitle the applicant to participate in the compensation fund, he must substantially comply with the statute. \* \* \* The English act \* \* \* suspends the statute of limitations under certain circumstances, such as mistake, absence and other causes. But our statute contains no such provision, and such provisions cannot be interpolated under the most liberal rules of construction.”

And in *Industrial Association of Colorado, et al., v. Peppas*, 204 Pac. 664, decided in 1922, the Supreme Court of Colorado held that the claim of a widow, residing in Greece, was barred and that she was not excused from giving written notice to the



employer company, which was required to be given within one year from the date of the accident, even though Greece was blockaded during the war and she had no knowledge of the accident.

In view of the foregoing, it would appear that the failure of plaintiff to file her claim for compensation on account of the existence of a state of war was not excused.

The second affirmative allegation of the reply, in substance, is that defendant by its acts waived notice of the claim of plaintiff for compensation.

There is a real distinction between waiver and estoppel, as noted in 40 Cyc. 256, viz:

“\* \* \* Waiver is the voluntary surrender of a right, estoppel is the inhibition to assert it from the mischief that has followed. Waiver involves both knowledge and intention, and estoppel may arise where there is no element to mislead; waiver depends upon what one himself intends to do; estoppel depends rather upon what he caused his adversary to do; waiver involves the acts and conduct of only one of the parties, estoppel involves the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position, an estoppel always involves this element. \* \* \*”

“By waiver is meant the intentional relinquishment of a known right or such conduct as warrants the relinquishment of such a right. Therefore, in order to constitute waiver, the person against whom the waiver is claimed must have full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such rights. 29

Am. & Eng. Ency. Law, page 1091, and authorities. \* \* \*''

State ex rel. Birchmore v. State Board of Canvassers, 14 L. R. A. (N. S.) 850, 855.

See also 27 R. C. L. <sup>Pages</sup> 906, 907, 908, 909.

Under the Vermont statute, which required notice and claim in writing to be made before an action for compensation could be maintained before the Commissioner of Industries, it was held that the making of a claim for compensation was necessary to give the Commissioner jurisdiction and could not be waived, full performance of the conditions of the act being essential requisites to the jurisdiction of the Commissioner, his authority and the statutory limitations upon the exercise of it cannot be enlarged, diminished or destroyed by express consent or waived by acts of estoppel.

Petraska v. National Acme Co., 113 Atl. 536.

In Dailey v. Stoll, 105 N. E. 87, the claim was made that the defendant waived the statutory notice because an alleged agent of defendant advised him not to have anything to do with lawyers, said plaintiff would be notified to come to defendant's office and that the defendant would settle with him; but that by the time he received his notice to go to the office, the 120 days had gone by. However, the court held the notice had not been waived.

In Georgia Casualty Co. v. Ward, 220 S. W. 380, the court held that the statutory provision requir-

ing the filing of a claim for compensation within six months is mandatory and a compliance with the requirements thereof is indispensable to the exercise of the right to maintain proceedings to compel the payment of compensation and this provision was not waived on account of letters written by the company agents to plaintiff's attorneys requesting them to have a claim for compensation blank filled out and to advise the agents as to the amount of compensation he was claiming, etc.

In the case of *Ohio Oil Company v. Industrial Commission*, 127 N. E. 743, it was contended that since the defendant had made payments to the plaintiff, the notice and the claim had been waived; but the court held that such payments, having been made voluntarily, were in the nature of a gratuity and did not constitute a waiver, saying:

“The notice within thirty days and the claim for compensation within six months are jurisdictional and an award cannot be sustained in the absence of evidence of a compliance with these requirements of the statute.”

It has also been held that failure to make out a claim for compensation within the statutory period because plaintiff could not speak, write or understand English and also because, on account of his injury, he was physically unable to do so, was not excused.

*Podkastelnea v. Michigan Central R. Co.* 164 N. W. 418.

Concealment of facts by the defendant as to the manner and cause of death until after the statutory

period has likewise been held not to be sufficient to prevent the running of the statute.

Kerley v. Hoehman, 8 A. L. R. 141.

See also Alvarado v. Southern Pacific Co., 193 S. W. 1108.

In appellant's brief, page 13, three decisions are cited on the proposition of waiver, which are distinguishable from the instant case, viz.:

Roberts v. Chas. Wolff Packing Co., 149 Pac. 413;

F. R. Conway Co. v. Industrial Board of Illinois, et al., 118 N. E. 705;

Smith v. Heine Safety Boiler Co., 112 A. 519.

In the Roberts case, *supra*, the Kansas Statute provided that the absence of notice should not be a bar unless the employer had been thereby prejudiced or if the failure to make a claim was occasioned by mistake, physical incapacity, or other reasonable cause, and the court found as facts from the evidence that there was reasonable cause for its delay since the defendant had asked that judgment be awarded to plaintiff and against defendant for limited sums, provided it was awarded in the form of periodical payments.

In the Conway case, *supra*, the court held that under the Illinois statute, it was unnecessary for the claim for compensation to be in writing, a verbal claim being sufficient, and, further, that the injured employee in the case had actually made a verbal claim for compensation.

In the Smith case, *supra*, the court held that the notice of the accident need not be in writing and that it was conceded verbal notice had been given.



Incidentally, the court also held that in view of defendant's letters admitting knowledge of the accident and liability therefor, defendant waived notice.

The affirmative allegations in the reply relative to waiver are immediately followed by allegations of estoppel, indicating the waiver was not made with the intention of relinquishing any rights. Under the above cited authorities, it is necessary that waiver to be effective must be made voluntarily and intentionally. However, as plead in the reply, the allegations of estoppel negative the allegations of waiver.

The third affirmative allegation in the reply refers to acts constituting estoppel on the part of the defendant.

It will be noted that the reply contains no allegations that there was a necessity for plaintiff to rely upon the alleged false statements of the defendant, and that plaintiff was free from negligence and that plaintiff was not in a position to use her own judgment or to prosecute her own inquiries in order to ascertain the truth. Under such a pleading, an estoppel cannot be maintained.

See:

Bigby v. Powell, 71 Amer. Dec. 168;

Gee v. Moss, 68 Iowa 318;

Newson v. Jackson, 71 Amer. Dec. 206;

Eames v. Morgan, 37 Ill. 260.

However, even if plaintiff relied upon fraudulent representations alleged to have been made to him by defendant, the defendant is not thereby estopped

from asserting or setting up statute of limitations as a bar to plaintiff's cause of action.

Bement v. Grand Rapids & I. R. Co., 194 Mich. 64; 160 N. W. 424; L.R.A. 1917E 322.

In this case the court said:

“A positive distinction seems to be made between cases in which the limitation of time for bringing suit is contained in the statute which creates the liability and the right of action and general statutes of limitations of the right of action existing under other statutes or under common law. In the former, the limitation of time is a limitation of the right and, as has been said, the suit cannot be maintained if not brought within the time limited. In the latter, the limitation of time for bringing suit is a limitation of the remedy only, and it has been held that under such general statutes of limitations, the defendant may be estopped from the benefit of the statute by an agreement waiving it or by concealment or by fraud. The statute here in question creates a new liability and takes away defenses formerly available and the right of action therein created is conditioned upon its enforcement within a prescribed period. The action not having been brought within such period designated by the statute, it is lost and the trial court ruled correctly in so holding.”

See also Twonko v. Rome Brass Co., et al., 120 N. E. 638;

Brown v. Weston-Mott Co., et al., 168 N. W. 437.

Another reason why under the allegations in plaintiff's reply an estoppel cannot be set up is because the fraud and misrepresentations therein al-

leged were practiced upon a third person and not upon plaintiff herself or upon one who at that time was the agent of the plaintiff. Defendant, obviously, could not be bound by any negotiations alleged to have been conducted between defendant and Matt Rogulj, a third person, since the extent of his authority would have been to have filed a claim on behalf of the beneficiary, which, incidentally, could have been done by any person.

In view of the above authorities, the court did not err in sustaining the demurrer.

The second assignment of error refers to the ruling of the court in sustaining defendant's objections to the admission of evidence on the part of plaintiff to show that her address was different from the address given by Peter Rogulj, deceased, in his statement to defendant at the time he entered its employ.

The question involved was whether the defendant had complied with the statutory provisions requiring it to mail a notice to the person named as beneficiary in the employee's statement at the address given therein. The correctness of the beneficiary's actual address was not in issue.

The defendant had no obligation under the act to make independent inquiries to ascertain the correctness of the address given by the employee. If such address should happen to be erroneous, the resultant injury, if any, would be chargeable to the carelessness of the employee and not to the fault of defendant.

The only duty imposed upon defendant in this connection was to direct a notice to the beneficiary named in the employee's statement at the address specified therein and when defendant, as in this case, had made out, directed and mailed the notice, following the language of the statute in so doing, the defendant had fulfilled its obligation. Incidentally, the purpose of giving the notice by defendant was to afford plaintiff an opportunity to notify defendant she was the actual beneficiary and dependent upon the deceased, proof of which was not in the possession of defendant, its only information in this connection being contained in the deceased employee's statement. Furthermore, defendant was not required to see to it that its notice to plaintiff was, in fact, actually delivered to her.

Consequently the evidence offered in this connection was irrelevant and immaterial to the issue, and the objection to its introduction was properly sustained.

The third assignment of error relates to the ruling of the court in instructing the jury to return a verdict for the defendant.

It is charged that the defendant failed to produce and offer in evidence the written statement of Peter Rogulj. However, in view of the stipulation entered into on the part of plaintiff and defendant herein, which was received in evidence and which set forth the contents of the statement and admitted the facts therein stated to be true, plaintiff cannot be heard



to say it was necessary to offer this statement in evidence, or that the address given therein of plaintiff as at Podaca, Austria, was not true.

It is also charged that the proof failed to show that no claim had been filed by plaintiff or someone in her behalf. The testimony on the part of the defendant showed that no such written claim had been filed with either the general manager or the assistant manager, who had charge of defendant's operations and would have received the notice of claim had it been served. Counsel for plaintiff had an opportunity to cross-examine these representatives of the defendant for the purpose of ascertaining if, by any chance, the claim had been filed with any other employee of defendant over the age of eighteen years at its principal place of business. However, counsel did not see fit to do this; neither did he offer any testimony to prove that the notice had, in fact, been filed, as he should have done since the plaintiff had the burden of proof upon this point. (In re Murphy, 115 N. E. 40.) Furthermore, if the claim had been filed, counsel would have known about it. In view of these facts and also of the admissions in the pleadings, it is apparent that plaintiff actually served no such notice on the defendant.

The court, therefore, properly instructed the jury to return a verdict for defendant.

We respectfully submit that under technical rules of law, as well as broad principles of justice, the

judgment of the lower court herein should be in all *respects*  
~~facts~~ affirmed.

Dated, February 19, 1923.

H. L. FAULKNER,  
*Attorney for Appellee.*

W. S. BAYLESS,  
*Of Counsel.*



IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MARY ROGULJ,

Appellant,

vs.

ALASKA GASTINEAU MINING CO., a Corpora-  
tion,

Appellee.

---

Appeal from the District Court for Alaska, Division No. 1.

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REPLY BRIEF OF APPELLANT.

J. H. COBB,  
Attorney for Appellant.

FILED

FEB 26 1923

F. D. MONTGOMERY





IN THE  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

MARY ROGULJ,

Appellant,

vs.

ALASKA GASTINEAU MINING CO., a Corporation.

Appellee.

Appeal from the District Court for Alaska, Division No. 1.

**Reply Brief of Appellant.**

The learned and exhaustive brief filed by the learned counsel for appellee does not call for reply excepting pages 18, 19 and 20 thereof, dealing with the second and third assignments of error.

From the argument made the learned counsel appears to have misapprehended the gist of these assignments.

The evidence excluded by the Court and complained of in the second assignment was not "to show that her [Mary Rogulj's] address was different from the address given by Peter Rogulj, deceased, in his statement to defendant," etc. Not

at all. *The evidence was offered to show what was the postoffice address of Mary Rogulj furnished to the defendant by Peter Rogulj, and that defendant had failed to mail the notice of Peter's death to that address.*

It was admitted by both sides that Peter Rogulj did furnish plaintiff's postoffice address to the defendant, but there was nothing to show what the postoffice address so furnished was.

It was further admitted that Peter had stated to defendant that Mary Rogulj lived in or at Podaca, Austria, all of which was unquestionably true, but it by no means followed that Podaca, Austria, was Mary Rogulj's postoffice address, or *the* postoffice address given the defendant by Peter Rogulj. In this state of the pleadings and proof, it was certainly competent for the plaintiff to show that the postoffice address of Mary Rogulj was and always had been "Zastroy, Selo Bodaca, Dalmatia, Austria," from which the jury could and should have found that that postoffice address was the one furnished, and defendant having failed to mail the notice correctly addressed, could not maintain the sole defense it offered. If, as a matter of fact, it had been true that Peter Rogulj had given defendant his mother's address as simply Podaca, Austria, it would have been very easy for defendant to show this by producing the written statement of Peter Rogulj in its possession. In short, having obtained an admission of the undoubted facts, first, that Peter Rogulj furnished defendant with his mother's postoffice address, and, second, that he had stated

she lived in Podaca, Austria, defendant attempted to complete its defense by proving that it mailed the notice of Peter's death to that address. It may be conceded that if Peter had in fact given his mother's postoffice address as Podaca, Austria, that defendant could have brought itself within the law so as to avail itself of the defense interposed by mailing the notice to that address, and in that case evidence to show that the postoffice address so given by Peter was the wrong address, would have been incompetent. But that is not the case. Peter gave defendant his mother's postoffice address, which of course means her correct address. Defendant did not mail the notice to that address, or indeed to any postoffice address at all, and its defense therefore failed.

The statement of counsel, beginning near the bottom of page 19 of their brief and continuing on page 20, is also misleading, in that it assumes that the stipulation between counsel contained an admission that Podaca, Austria, was the postoffice address of his mother, given the defendant by Peter Rogulj. The stipulation continues in such admission.

Respectfully submitted,

J. H. COBB,  
Attorney for Appellant.





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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EMERY VALENTINE,

Appellant,

VS.

JOSEPHINE G. VALENTINE,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the District of Alaska, Division Number One.

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**FILED**  
DEC 13 1922  
F. D. MONCKTON,  
CLERK



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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EMERY VALENTINE,

Appellant,

vs.

JOSEPHINE G. VALENTINE,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the District of Alaska, Division Number One.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

JOHN H. COBB, Esq., Juneau, Alaska,  
Attorney for Appellant.

H. L. FAULKNER, Esq., Juneau, Alaska, and  
HENRY RODEN, Esq., Juneau, Alaska,  
Attorneys for Appellee.

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In the District Court for the District of Alaska,  
Division No. One, at Juneau.

No. 1375-A.

JOSEPHINE G. COOK VALENTINE,  
Plaintiff,

vs.

EMERY VALENTINE,  
Defendant.

**Amended Complaint.**

Comes now the plaintiff above named, and, leave of the Court having first been had and obtained, files this her amended complaint, and complaining of the defendant, alleges as follows:

**I.**

That both the plaintiff and defendant are now and have been for more than two years last past inhabitants and residents of the Territory of Alaska and of the First Judicial Division thereof, and are the owners and possessors of both real and personal property in said Territory and in said Judicial Division.



## II.

That plaintiff's name, prior to her marriage to the defendant, was Josephine G. Cook. That on December 16th, 1909, plaintiff and defendant were duly married at Juneau, in the Territory of Alaska, and ever since said time have been married and occupying the relation of husband and wife.

## III.

That in the month of October 1910, defendant commenced a course of cruel and inhuman treatment towards plaintiff which was calculated to and did impair the health of plaintiff and endanger her life, which said treatment of plaintiff was continued by defendant during the whole period from said month of October, 1910, until the month of October, 1915, and in this respect, plaintiff alleges: That during the said month of October, 1910, while on board the steamer [1\*] "Princess Royal," upon which plaintiff and defendant had engaged passage from Juneau, Alaska, to Vancouver, B. C., defendant became intoxicated and after cursing and abusing plaintiff and using toward her vile, profane, abusive and opprobrious language, left her stateroom on said steamer and remained absent from plaintiff and refused to associate with her for the period of three days. That some time during the month of March, 1911, while defendant was intoxicated in the barroom of the Juneau Liquor Company on Front Street, Juneau, Alaska, plaintiff endeavored to induce defendant to accom-

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\*Page-number appearing at foot of page of original Transcript of Record.

pany her to their home, whereupon defendant cursed and reviled plaintiff in the presence of a number of men and of plaintiff's minor child, and applied to her vile, profane and abusive language, too obscene to be spread upon the records of this court. That on or about the 31st day of August, 1911, defendant left the home of plaintiff where he had been living for almost two years, and without any notice to plaintiff of his intention so to do, remained absent from said home for a period of two weeks, during all of which said period defendant was intoxicated. That on December 10th, 1914, at the jewelry store of defendant on Front Street, Juneau, Alaska, defendant assaulted plaintiff and pushed and shoved her from the counter and showcase in said store.

That on the 30th day of January, 1915, at the home of plaintiff at Juneau, Alaska, defendant, while intoxicated, assaulted plaintiff with a heavy cane and threatened to kill plaintiff; that at said time and place defendant choked, abused, and ill treated plaintiff, dragged her by the hair and forced her to leave the bed in which she was asleep with her minor child, and forced her to accompany him to another room in said home, where he uplifted a brandy bottle and threatened to strike plaintiff with the same upon the head. That during all of said period above mentioned and at divers and sundry times, too numerous to mention and therefore not alleged, at the home of plaintiff in Juneau, defendant has been guilty of extreme and repeated cruelty toward plaintiff in

this, that he has annoyed, [2] harassed and humiliated plaintiff by using profane, obscene, abusive, opprobrious and vile language toward plaintiff. That all of such cruel and inhuman conduct as herein alleged has greatly impaired the health of plaintiff and endangered her life and rendered it unsafe and impossible for plaintiff to continue to live in the same house with defendant.

Plaintiff further alleges that ever since said marriage she has conducted and demeaned herself toward the defendant as a true, faithful and affectionate wife; and that said acts of cruelty and inhumanity of defendant toward plaintiff were without the fault of the plaintiff.

#### IV.

That since the month of February, 1910, the defendant has become an habitual drunkard and has been habitually and grossly drunk and has contracted habitual and gross drunkenness; and has come into the home of the plaintiff in a condition of gross drunkenness and treated the plaintiff in a dangerous and threatening manner; and while in said state of gross drunkenness, used vile and opprobrious epithets toward plaintiff, all without the fault of plaintiff.

#### V.

That there has been no issue of the marriage between the plaintiff and defendant. That the plaintiff is the mother of one child from her previous marriage with Frank P. Cook, namely Madeline Cook, aged eleven years; and that the plaintiff is charged with the care and maintenance of the

said Madeline Cook; that the plaintiff has the custody and control of the said minor child, Madeline Cook, and the custody and control of the property of the late Frank P. Cook, deceased, to which the said Madeline Cook is the sole heir. That the plaintiff has a separate estate consisting of lot 3, block 108 in the Townsite of Juneau, Alaska, upon which there is a mortgage of \$1400.00 or thereabouts, and in which the plaintiff and defendant and said Madeline Cook have lived during the time herein referred to and since the marriage of plaintiff to defendant. That the gross and habitual drunkenness of the defendant and the acts of [3] cruel and inhuman treatment herein complained of, have been committed in the home of the plaintiff above referred to, and in the presence and immediate whereabouts of the said Madeline Cook, minor child of the plaintiff; and that the conduct of the defendant is a menace to the health and safety, not only of the plaintiff, but also to the health and security of the said minor child Madeline Cook. That the plaintiff has no property of her own, except the said lot 3 in block 108, which said property is worth approximately \$5,000.00; and plaintiff's equity in said property is approximately \$3,500.00; and that the same is necessary for the use of the plaintiff for a residence and home for herself and said minor child.

## VI.

That the defendant is the owner of real estate in the Town of Juneau, Alaska, of the value of not less than \$70,000; and is the owner of personal



property of the value of not less than \$15,000, and has an income therefrom of approximately \$12,000 per annum. That the plaintiff is without funds with which to prosecute this suit and is without funds to pay for her necessary maintenance during the pendency of this suit; and that for some time prior to the filing of this complaint, the defendant has refused to pay the plaintiff's bills for her necessary clothing and has from time to time appropriated the proceeds of the rentals of the property of Madeline Cook, minor child of the plaintiff.

WHEREFORE, plaintiff prays that after the commencement of this suit, the Court or Judge thereof may provide by an order that the defendant pay, or secure to be paid to the Clerk of this court such an amount of money as may be necessary to enable the plaintiff to prosecute this action;

That upon, or after the commencement of this action, the Court or Judge thereof, provide by order for the freedom of the plaintiff from the control of the defendant during the pendency of this action and that the defendant be restrained and enjoined from visiting, or [4] entering upon the premises belonging to the plaintiff herein, to wit, lot 3, block 108, Town of Juneau, and from in any way molesting or interfering with the plaintiff and her minor child Madeline Cook.

That during the pendency of this action the Court restrain the defendant from disposing of any of the property of either party hereto.

That the marriage of the plaintiff and defendant be dissolved.

That when said marriage is dissolved the plaintiff have and recover of and from the defendant \$30,000.00 in gross for the maintenance of the plaintiff, or in the alternative, that the defendant allot the sum of \$4,000.00 per annum for her maintenance and that the trustees be appointed to collect, receive, expend, manage or invest a sufficient sum of money for such maintenance, so as to provide an income of not less than \$4,000.00 per annum for the plaintiff.

That the name of the plaintiff be changed, and that the plaintiff be allowed to resume her former name, to wit, Josephine G. Cook, and for such other and further relief as to the Court may seem meet and proper.

That the plaintiff recover her costs and disbursements herein laid out.

L. P. SHACKLEFORD,  
H. L. FAULKNER,  
Attorneys for Plaintiff. [5]

United States of America,  
Territory of Alaska,—ss.

Josephine G. Cook Valentine, being first duly sworn, deposes and says: That she is the plaintiff named in the foregoing complaint, that she has read said complaint and knows the contents thereof; and that the facts therein stated are true and correct as she verily believes.

JOSEPHINE G. COOK VALENTINE.

Subscribed and sworn to before me this 8th day of December, 1916.

[Notary Seal]

H. L. FAULKNER,  
Notary Public for Alaska.

My commission expires Nov. 14, 1918.

Service of copy of above complaint admitted this 9th day of December, 1916.

J. H. COBB,  
Attorney for Defendant.

Filed in the District Court, District of Alaska,  
First Division. Dec. 9, 1916. J. W. Bell, Clerk.  
By \_\_\_\_\_, Deputy. [6]

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In the District Court for Alaska, Division Number  
One, at Juneau.

No. 1375-A.

JOSEPHINE G. VALENTINE,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

**Answer and Cross-complaint.**

Now comes the defendant by his attorney, and for answer to the amended complaint herein, alleges:

I.

Defendant admits the allegations set out in paragraphs I and II of said amended complaint.

## II.

Defendant denies all and singular the allegations contained in paragraphs III and IV, except as hereinafter expressly admitted, and explained.

## III.

Referring to paragraph V of said amended complaint, defendant denies all and singular the allegations contained in that part of said paragraph beginning with the words, "That the gross and habitual drunkenness," on line two from the bottom of the page, to and inclusive of the words "Lot 3, in Block 108," in the fifth line from the end of said paragraph.

## IV.

Referring to paragraph VI, defendant admits that he is the owner of certain real and personal property in the City of Juneau, Alaska, but denies that said property is of the value alleged, or any greater value than about \$40,000 in real estate, and \$8,000 in personal property; and he further denies that his income therefrom is \$12,000 per annum or any greater sum than about [7] \$4,000 per annum. And he denies all and singular the other and remaining allegations in said paragraph contained.

And further answering therein, by way of an affirmative answer and cross-complaint, the defendant alleges:

## I.

Plaintiff and defendant intermarried at Juneau, Alaska, on December 16th, 1909, but fortunately there is no issue of said marriage.



## II.

Both plaintiff and defendant had previously been married, and both had reached middle age at the time of said marriage. Both had resided in Juneau for many years, and plaintiff was fully acquainted with the defendant's habits, disposition, personality, tastes, and means.

## III.

That at the time of the decease of plaintiff's former husband, Frank A. Cook, she was left practically penniless; the home was mortgaged, as was also the house and lot on Douglas Island, referred to in the amended complaint, for their then practically full value; there were other unsecured debts of said estate, aggregating a large sum, and unless plaintiff had obtained the financial aid hereinafter set out she would have been left without anything whatever from the estate of Frank A. Cook, deceased.

## IV.

That shortly after the plaintiff became aware of the financial straits in which she had been left upon the decease of her former husband, she determined to seek out and use the defendant for the purpose of extricating herself from her financial difficulties. That more than a year before their marriage plaintiff solicited financial aid from the defendant, and by appealing to his sympathies she induced him to advance to her upwards of \$4,000, which was largely used for the purpose of carrying the mortgages on her home, and [8] the said property on Douglas Island. That thereafter,

and pursuant to her purpose aforesaid, plaintiff invited defendant to visit her, and deliberately set to work to gain his affections, and marry him, that as a result of her efforts in that behalf, plaintiff did gain the defendant's affections, but her own were never at any time given to the defendant, but nevertheless they were married on December 16th, 1909, as before stated.

V.

That very shortly after said marriage defendant first became aware that he had married a woman of a most imperious and tyrannical disposition; a character cold, calculating and utterly selfish; and that she was without the slightest feeling of regard or conjugal affection for him, if indeed she was capable of such a feeling at all. That nevertheless defendant set himself to the task of gaining the plaintiff's wifely affections by showing her every kindness and consideration, and especially by indulging as far as he was financially able her love of extravagance, which appeared to be the only means by which he could in any way please her. But all his efforts were unavailing, and plaintiff did not have at the time of said marriage, and never has had for defendant any such affection as she should have had before she married him; that she deliberately deceived the defendant in that respect by pretending an affection she never felt; and at the time of said marriage, and ever since, it has been the plaintiff's purpose and intention to so harass and worry the defendant, and make his life so miserable that he

would either die therefrom, or to drive him to excesses and outbursts of temper in recrimination of her cruelty, so as to give her ostensible grounds for divorce and alimony.

## VI.

That pursuant to said purpose and intention, plaintiff, almost immediately after said marriage, began and has ever since maintained [9] toward defendant a course of most cruel and inhuman treatment of which her cold and calculating nature was capable and her studied ingenuity could suggest. That said conduct on the part of the plaintiff extended, with very slight intermissions, from the date of said marriage until the final separation as hereinafter set out; that defendant has from time to time remonstrated with her, begged and plead with her, and has at times been compelled to absent himself temporarily from her presence and society, but he alleges that he has never spoken a harsh word to her, or neglected her, or avoided her society, except when driven thereto by the cruel and inhuman conduct of the plaintiff, and he has never at any time mistreated her.

## VII.

That among many other instances too numerous to set out, or even to recall, the following illustrate the plaintiff's general course of conduct toward defendant:

That on December 25th, 1909, nine days after their marriage, one Mrs. Jarmy, a friend and acquaintance of plaintiff, called at their home in Juneau, Alaska, and defendant shook hands with

her; that as soon as the said caller left the house, plaintiff in a most cutting, sarcastic, and insulting manner, upbraided, reviled, and abused defendant for said conduct, claiming among other things that it was insulting to her as a wife for defendant to shake hands with any other woman in her presence. That a short time later another lady of plaintiff's acquaintance called upon them, and remembering the scene narrated above, when said lady offered her hand in the usual form of greeting, defendant let drop some article he was holding and immediately stooped to recover, so as to avoid the offered handshake, without appearing to be rude. That no sooner had the said caller left, however, than plaintiff indulged another violent outburst, again reviling and abusing the defendant, and accusing him among other things of deliberately insulting her friends when they called upon her. [10] That at the time of said marriage defendant was charged with the care and custody of a stepdaughter, a girl of tender years, who was congenitally weakminded, and needed constant care and attention, and to whom defendant was deeply attached. That plaintiff was unwilling to allow said child to live in the family, and defendant procured her a home in another family in Juneau, where he could frequently see and constantly look after her welfare. That shortly after said marriage plaintiff objected to said child remaining in Juneau, claiming, among other things, that to have a child so afflicted and so connected with her husband remain in the same



town was a detriment to her social standing in the community. That in order to placate the plaintiff, and in the effort to make a happy home for plaintiff and himself, he consented to place said child in an institution, and one at Victoria, B. C., was selected.

That on or about October, 1910, he engaged passage on the steamer "Princess Royal" for himself, plaintiff, her daughter Madeline, and said child, for Victoria to place the latter in said institution, but upon reaching Victoria said institution could not receive her and he placed her in an institution in Vancouver, B. C., where she has since remained.

Defendant further shows that on said trip, and on the first evening after leaving Juneau, shortly after dinner, while plaintiff and defendant were sitting in the social hall of the steamer, a gentleman approached and said he wanted to see defendant; that defendant excused himself from plaintiff, and went to the smoking-room, remaining there till about 9 P. M., but upon returning he did not see plaintiff in the social hall, and on going to their stateroom found her undressing to retire; that she immediately turned loose upon him a tirade of the most insulting, cutting, and unseemly abuse for having left her; that defendant remonstrated with, and tried to placate her, but all to no avail; that both said [11] children were in the room at the time and became greatly excited; that upon plaintiff's demand he retired, occupying the berth with Madeline; that plaintiff con-

tinued her tirade of quarreling and abuse, and said children becoming extremely excited and restless defendant was unable to sleep or rest, and arose and dressed and spent the rest of the night in the smoking-room. That plaintiff did not quiet down until the vessel reached Vancouver, and for that reason defendant was compelled to and did stay away from her on the voyage, occupying thereafter another stateroom, all of which was rendered necessary by and due solely to the plaintiff's conduct as aforesaid.

That thereafter, in March, 1911, defendant received a message by cable to the effect that his stepdaughter in Vancouver was seriously ill, at which defendant was greatly concerned and expressed the intention of going to Vancouver to see her. That that evening at their home plaintiff indulged in an outburst of abuse, and referred to said child as "that creature," and made light of her affliction, all for the purpose, as defendant verily believes, and therefore alleges, of harassing, vexing, and worrying him.

That on the next day, while still in bad temper, plaintiff came downtown in Juneau, and seeing defendant in the storeroom of the Juneau Liquor Co. on Front Street, came in and for the purpose of humiliating him and making him an object of ridicule pretended to think defendant was drunk, and demanded that he at once go home with her, saying among other things that "Frank Cook (her former husband) always went home with her when he got drunk." That there was no cause

whatever for said conduct of plaintiff, but it was due solely to her resentment because of the defendant's expressed intention to visit his step-daughter.

That while in Seattle on said trip, Oct. 1910, defendant went to the cigar-stand in the hotel at which they were stopping and was lighting a cigar and speaking to the woman in charge of the [12] counter when plaintiff came in. No reference was made to the incident until after plaintiff and defendant returned to Juneau, shortly after which plaintiff indulged in a tirade of abuse and said among other things, "I am not going to have you lolling around talking to those women," and while still in such temper took her pillow, went and locked herself in another room and for about three months refused to sleep with defendant, eat at the same table, or even speak to him.

That on or about July 28th, 1911, plaintiff was attending the counter in his store when a woman purchased a pair of sleeve buttons for \$17.00, handing him in payment two five and a ten dollar piece; defendant placed the buttons in a small jewelry box, and handed the same with \$3.00 in change to the woman; that plaintiff entered the store during said transaction and as soon as the purchaser left began reviling and abusing the defendant, charging him with having given away said buttons and change, and demanded to see the money the woman had paid, which defendant showed her, but plaintiff refused to be placated, and went home in a fury. When defendant went home that eve-

ning he found her still in a towering rage, and she abused, vilified, and reviled defendant to the full extent of her powers and finally went off to bed in another room. On the day following plaintiff packed a trunk with defendant's clothes and toilet articles, sent it down to the house owned by defendant and which he had occupied as his home prior to said marriage, and at the same time sent defendant word that he could not come to her house any more or live with her further; that defendant thereafter stayed away from plaintiff, sleeping at his said house for about a week or ten days, when plaintiff met him on the street and she asked him for a subscription of \$25.00 to some charity for which she was soliciting; that defendant subscribed said sum, and later in the day plaintiff came to defendant's store, got said sum, and going behind the counter took a silver mesh purse from the stock and left. On the following Sunday defendant [13] returned to plaintiff's home and resumed living there but plaintiff refused to speak to him for some time thereafter.

That similar outbursts of temper, on the part of plaintiff, and similar abuse of defendant, continued with but little intermission all during 1912 and 1913. Among the many things resorted to by plaintiff to annoy defendant, plaintiff would refer to her former husband and draw comparisons between him and defendant to the great advantage of the former, and she habitually refused to speak to defendant on the streets of Juneau on



occasions when she met him and when she was accompanied by her acquaintances.

That matters reached such a state in July, 1914, that plaintiff ceased speaking to defendant at all, and has not since said date lived with him as his wife, but has occupied a separate room, and constantly avoids being in his presence.

That on or about December, 1914, plaintiff, although she had not spoken to defendant since the preceding July, came into his jewelry store in Juneau and without speaking began gathering up articles of jewelry, evidently intending to take them away; that defendant approached her, asked her what she wanted, and telling her he was there to wait on her, if there was anything she desired. Plaintiff made no answer, but threw down the articles and left the store in apparent great anger.

That plaintiff's cruel and inhuman treatment of defendant was calculated to and in fact has impaired his health, and rendered their living together longer insupportable.

### VIII.

Defendant further alleges that pursuant to her purpose of aggravating and provoking defendant in some outbreak of temper, or leading him into some other conduct that would justify her in applying for a divorce and alimony, plaintiff, immediately after said marriage, and well knowing that defendant occasionally drank to excess, began systematically to ply him with liquors, and when [14] on speaking terms with him, habitually sought to get him to drink with her. That

while she failed in her main object, she in the meantime developed a craving for liquor beyond her control, and soon became addicted to habits of habitual gross drunkenness, which habit was contracted since said marriage, and has continued for more than a year next before the bringing of this suit.

### IX.

Defendant further shows that since the said marriage he has supported the plaintiff in as comfortable circumstances as his means justified; that in addition thereto, and including the moneys advanced before the marriage, he had given the plaintiff money and property of upwards of fifteen thousand dollars, and she has securities obtained by him, for her, and which she could not have obtained except through his financial aid, amounting to \$15,000 more; that she has to that extent accomplished the purpose for which she married defendant, and to allow her anything more by way of alimony in instalments or as a gross sum would be for the Court to lend its aid to her in still further accomplishing said purpose.

Premises considered, defendant prays:

1st. That plaintiff take nothing by her said amended complaint, except a change of her name, to which defendant consents, and that said complaint be otherwise dismissed.

2d. That the bonds of matrimony heretofore existing between plaintiff and defendant be annulled,

set aside, and for nought held, upon the defendant's cross-complaint.

3d. For such other and further relief as the nature of the case may require.

J. H. COBB,

Attorney for the Defendant. [15]

United States of America,

Territory of Alaska,—ss.

Emery Valentine, being first duly sworn on oath, deposes and says: I am the defendant above named. The above and foregoing answer and cross-complaint is true as I verily believe.

EMERY VALENTINE.

Subscribed and sworn to before me this the 22d day of December, 1916.

[Notary Seal]

E. L. COBB,

Notary Public in and for Alaska.

My commission expires Dec. 3, 1918.

Service of the above and foregoing answer and cross-complaint admitted this the 23d day of Dec., 1916.

H. L. FAULKNER,

Attorney for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Dec. 23, 1916. J. W. Bell, Clerk.  
By ———, Deputy. [16]

In the District Court for the District of Alaska,  
Division No. 1, at Juneau.

No. 1375-A.

JOSEPHINE G. COOK VALENTINE,  
Plaintiff,

vs.

EMERY VALENTINE,  
Defendant.

**Reply to Affirmative Answer and Cross-complaint.**

Comes now the plaintiff and in reply to the affirmative answer and cross-complaint of the defendant herein, admits, denies and alleges as follows:

**I.**

Plaintiff admits the allegations contained in paragraph I of said cross-complaint.

**II.**

Plaintiff admits the allegations contained in paragraph II of said cross-complaint except that she was fully acquainted with defendant's habits, disposition, personality, tastes and means prior to their said marriage, which said allegation plaintiff denies.

**III.**

Plaintiff denies the allegations contained in paragraph III except that the home was mortgaged at the time of the decease of Frank A. Cook, which said allegation she admits.



## IV.

Plaintiff denies the allegations contained in paragraph IV, V, VI, VII, VIII and IX of said complaint.

WHEREFORE plaintiff prays that said cross-complaint be dismissed and that she have the relief demanded in her complaint on file herein.

H. L. FAULKNER,

Attorney for Plaintiff. [17]

United States of America,  
Territory of Alaska,—ss.

Josephine G. Valentine, being first duly sworn, deposes and says: That she is the plaintiff named in the foregoing reply; that she has read said reply and knows the contents thereof and that the same is true as she verily believes.

JOSEPHINE G. VALENTINE.

Subscribed and sworn to before me this 30th day of January, 1918.

[Notary Seal]

H. L. FAULKNER,

Notary Public for Alaska.

My commission expires November 14, 1918.

Copy recd. Jan. 31st, 1918.

J. H. COBB,

Atty. for Deft.

Filed in the District Court, District of Alaska,  
First Division. Jan. 31, 1918. J. W. Bell, Clerk.  
By C. Z. Denny, Deputy. [18]

In the District Court for the Territory of Alaska,  
Division No. One, at Juneau.

No. 1375-A.

JOSEPHINE G. COOK VALENTINE,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

**Memorandum Opinion.**

This action was brought by Josephine G. Cook Valentine against her husband, Emery Valentine, on October 23, 1915, charging the defendant with cruel and inhuman treatment calculated to impair health, and praying for a decree, dissolving the bonds of matrimony, and for alimony and other relief. The original complaint, not having been deemed sufficiently specific and certain, by order of the Court, on December 12, 1916, an amended complaint was filed, detailing with more particularity, the acts constituting the cruelty complained of, and concluding with a prayer for the same relief as in the original complaint. To this amended complaint, defendant on December 23, 1916, made answer, denying specifically the several allegations of cruelty set up in the complaint and alleging, by way of cross-complaint, certain acts of cruelty on the part of the plaintiff, constituting cruel and inhuman treatment, calculated to impair the health of defendant, and praying a dissolution

of the bonds of matrimony between the plaintiff and defendant. On January 23, 1918, the plaintiff replied to the affirmative matter of defendant's answer and cross-complaint, denying all the affirmative matter. *In limine* there was an order made by the court, directing payment of alimony *pendente lite* monthly, in the sum of \$100 a month, and also an injunction issued, restraining defendant from disposing of his realty during the pendency of the action. The temporary alimony, during the long period of inaction, up to the time of trial in December, 1921, appears to have been paid with reasonable regularity by defendant. [19]

The case came on for trial on November 26, 1921, and testimony was submitted on behalf of the contentions of either party. At the conclusion of the testimony, defendant was granted time to submit a brief and the same was filed in February, 1922.

The parties were married in Juneau, Alaska, on December 16, 1909, and have continuously resided within the Territory since the date of marriage. There are no children begotten of the union. Plaintiff is the mother of a daughter, Madeline, by a former marriage. The testimony discloses that the plaintiff, at the time of her marriage with defendant, was a widow, her former husband having died in the month of December, 1905, leaving an estate consisting of some business property in Douglas, Alaska, a house and lot in Juneau, which was the home of plaintiff, and a number of unpatented mining claims in this Divi-

sion of the Territory. The estate was quite heavily in debt and the home property, as well as that in Douglas, was encumbered with a mortgage to a local bank.

It appears that the defendant had been several times married before and twice divorced. He had for many years been a resident of Juneau, Alaska, and has been prominent in business and political circles in the city. He was a man in easy circumstances, having accumulated considerable business property, and had an assured income in rents and from his business as a jeweler.

In the year 1908, prior to his marriage with the plaintiff, defendant took over the mortgage on the home of plaintiff and the property in Douglas and has ever since held and now holds the same. He also, at a sale of the mining property of plaintiff's former husband, under an order of the probate court, in the course of the probate of the estate of the deceased husband, bought in the mining claims of the estate in his own name and has since held legal title thereto, but in November, 1913, after his marriage, he made a declaration of trust in favor of plaintiff therefor. [20]

It appears further, from the testimony, that at various times, before and after the marriage, defendant advanced small sums of money, in payment of taxes, supplies, etc., to the plaintiff, but these advances were in the nature of gifts and although stressed by defendant in his testimony, cannot have any bearing on the issues in the case. There is no issue made or tendered in the plead-



ings, or set forth in plaintiff's testimony, as to the lack of support of plaintiff by defendant; but the whole testimony discloses that the defendant was liberal, if not lavish, in his expenditures for the joint household expenses.

According to the testimony of the defendant, almost from the date of the marriage, there was unprovoked bickering, disputes and mutual misunderstanding and recrimination between plaintiff and defendant. For months at a time, according to the testimony of defendant, during their almost six years of married life, plaintiff would not speak to defendant, and, in support of his contention in regard to cruel treatment, the defendant, in his testimony, recited a number of instances of verbal upbraiding on the part of the plaintiff and also of neglect, which constituted the foundation of his cross-complaint.

The plaintiff in her testimony, while denying the testimony of defendant, charges *plaintiff* with drunkenness, with having a violent temper and testified to a number of instances wherein she was abused, not only by word of mouth, but where physical violence was offered, if not actually done, to her person. She further testified that the defendant was a periodical drunkard and at intervals indulged excessively in intoxicants to such an extent that for several days at a time he became incapacitated for business and a charge upon her. To some extent, defendant admits that he indulged in intoxicants, but says that all his life he has been accustomed to [21] their use and that

plaintiff was, or should have been aware of this fact before the marriage and that on his marriage, he resolved to abstain from such indulgence and did so until the harsh and cruel treatment of plaintiff caused him to return to his old habit.

After a careful consideration of all the testimony submitted, I am of the opinion that a divorce should be granted on the application of the plaintiff, and that defendant's cross-complaint should be dismissed. The charges and counter-charges of the conduct of one toward the other as continuing during the time they were living together during the several years prior to September, 1915; their final separation before the bringing of this action, the subdued current of animosity running through the testimony of defendant at the trial, show conclusively that the parties have lost their mutual respect and confidence necessary to even a reasonably happy conjugal relation. The plaintiff possibly may not have been entirely free from fault, but she appears to be a refined woman of a charitable disposition and during the time she was living with the defendant, was prominent in the social life as well as in the religious, charitable and other worthy activities of the community. Naturally, having such a position, she was sensitive as to the conduct of her husband. The defendant, on the other hand, was born and raised in the western states. He was proud of his independence and of his business acumen and resented any interference therewith. It seems that the greater fault lay with the husband in that he at

times prostrated his natural ability in the gratification of his appetite for drink to excess. While the defendant testified that his wife should have known this, defendant's admitted failing before the marriage, yet she testifies positively that she did not, and it is a natural sequence that, when this habit, with its consequences, was brought to her knowledge, she would complain. [22]

It has been the tendency of the later decisions of the Courts to hold that drunkenness of one spouse, long continued and at intervals, constitutes cruelty calculated to injure the health of the other. This especially in the case of a woman of a nervous or a high-strung disposition, and I am inclined to follow these decisions, especially in the face of the apparent fact that the parties herein are unable to live peaceably together.

The question of permanent alimony has given me considerable thought. The defendant has during the pendency of this suit, for nearly six years, been paying plaintiff temporary alimony at the rate of \$100 a month and, during that time, has paid out, on the order of the Court, other sums. He also voluntarily in his testimony, and through his counsel, disclaims any interest in the mining claims held in trust by him and in the mortgage indebtedness long overdue on the homestead in Juneau and the property in Douglas. This offer, which is fair under the circumstances of the case, should be accepted and made a part of any alimony awarded the plaintiff. The separate properties of plaintiff would then be unencumbered

and would consist of the home property in Juneau of the approximate value of \$5,000; the Douglas property of small value and certain unproductive, unpatented mining claims, the value of which it is difficult to estimate under the present conditions of the industry, although they were bonded for the sum of \$20,000.

The defendant's property consists of real estate and a jewelry business in Juneau, Alaska. The defendant has made an estimate, in his testimony, of its value at approximately \$48,000. The valuation of \$68,000 appears to have been placed on the real estate of defendant by the last city assessment-rolls. The present rentals from defendant's real property amount to about \$500 a month, from which should be deducted taxes, insurance and repairs, amounting to approximately \$200 a month. [23]

The plaintiff herein asks for alimony in the sum of \$25,000. This amount, as I view it, is excessive and cannot be allowed; nor am I of the opinion that alimony in any lump sum should be imposed upon the defendant at this time because of the present depressed condition of financial affairs in the community generally. A fair award to the plaintiff, in my judgment, would be that the mortgage on plaintiff's property be satisfied; that the defendant convey the property mentioned in the declaration of trust to the plaintiff and that the plaintiff have and receive as alimony the sum of \$7,500, payable in monthly installments of \$125, on or before the tenth day of each month until the



sum of \$7,500 be paid, with the option to defendant, at any time, to satisfy the judgment by paying the sum to net the plaintiff in all the sum of \$7,500 aforesaid.

Let findings and decree be prepared and submitted accordingly and let it be further provided therein that the Court retain jurisdiction of the question of alimony herein in accordance with the provisions of the statute in such case made and provided.

THOS. M. REED,  
Judge.

Delivered May 13, 1922.

Filed in the District Court, District of Alaska, First Division. May 13, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [24]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1375-A.

JOSEPHINE G. COOK VALENTINE,  
Plaintiff,

vs.

EMERY VALENTINE,  
Defendant.

**Findings of Fact and Conclusions of Law.**

This cause came on regularly for trial on the 28th day of November, 1921, before the Court without a jury, and the plaintiff appearing in per-

son and by her attorneys H. L. Faulkner and Henry Roden, and the defendant appearing in person and by his attorney, J. H. Cobb; and from the evidence introduced, the Court finds the facts as follows, to wit:

I.

That plaintiff and defendant are both residents and inhabitants of the Territory of Alaska and of the First Division and have been such for more than two years preceding the commencement of this action.

II.

That plaintiff and defendant intermarried at Juneau, Alaska, on December 16, 1909, and ever since have been and are now husband and wife.

III.

That since the month of February, 1910, the defendant has become an habitual drunkard and has contracted the habit of habitual and gross drunkenness; and that during the period from February, 1910, to the present time defendant has been habitually and periodically intoxicated; and that in the month of October, 1910, defendant commenced a course of cruel and inhuman treatment toward plaintiff, which was calculated to, and which did impair the health of plaintiff [25] and endanger her life; and that said treatment was continued by defendant during the whole period from the month of October, 1910, until the date of the filing of the complaint in this action; and that said treatment consisted of assaults upon the plaintiff by the defendant and of abuse, threats and neglect,

and of the application to the plaintiff by the defendant of vile, profane and opprobrious epithets and that defendant on numerous occasions during said period reviled and abused plaintiff, and annoyed, harassed and humiliated her by the use of profane, obscene, abusive, opprobrious and vile language toward plaintiff. That all of such cruel and inhuman conduct on the part of defendant impaired the health of plaintiff and endangered her life and obliged her to seek the services and treatment of a physician; and that such conduct and such treatment of plaintiff by defendant rendered it unsafe and impossible for plaintiff to continue to live with the defendant.

#### IV.

That all of the conduct above mentioned, and the cruel and inhuman treatment by defendant of the plaintiff, and the habitual drunkenness were all without the fault on the part of the plaintiff and have never been condoned by the plaintiff, and that plaintiff has been without fault in said matters.

#### V.

That defendant has property in Juneau of the value of more than Seventy Thousand Dollars (\$70,000.00); and that plaintiff is wholly without any means of support, save rentals from an old building in Douglas, which brings her a gross income of One Hundred and Twenty Dollars (\$120.00) a year, from which has to be deducted all the costs and expenses of the upkeep of said property, including taxes and repairs; and that

said property is mortgaged to defendant, and that said mortgages are long past due, and that defendant holds a [26] mortgage upon the property of plaintiff and plaintiff's minor child, Madeline Cook, which said property consists of Lot No. 3 in Block No. 108, town of Juneau, Alaska, and Lot No. 1 in Block No. 45 of the town of Douglas, Alaska, and that defendant holds in trust for the plaintiff certain mining claims of speculative and uncertain value which are known as the Falls and Diana Lode Mining Claims, situate in the Berners Bay Mining District, Alaska, and that defendant has testified to his willingness to cancel said mortgage and to deed to the plaintiff the said mining claims.

## VI.

That plaintiff's name prior to her marriage to the defendant was Josephine G. Cook.

As a conclusion of law from the foregoing facts the Court finds that plaintiff is entitled to a decree dissolving the bonds of matrimony now and heretofore existing between plaintiff and defendant and changing the name of plaintiff to Josephine G. Cook; and to the sum of Seventy-five Hundred (\$7500.00) Dollars permanent alimony for the maintenance of plaintiff payable in monthly installments of \$125.00 on or before the tenth day of each month hereafter until the full sum of Seventy-five Hundred (\$7500.00) Dollars has been paid; with the option to defendant at any time to satisfy the Judgment by paying the full sum of \$7500.00 to the plaintiff as aforesaid; and for her costs and



disbursements herein; and further that the defendant convey to the plaintiff the mining property above mentioned, to wit: The Falls and Diana patented lode mining claims and that defendant cancel and satisfy the mortgages he now holds upon Lot No. 3 in Block No. 108 of the town of Juneau, Alaska, and Lot No. 1 in Block No. 45 of the town of Douglas, Alaska; and the Court further finds that defendant's cross-complaint should be dismissed; and it is hereby ordered that a decree be entered accordingly and that the Court retain jurisdiction of the question of [27] alimony herein in accordance with the provisions of the statutes in such cases made and provided until the same has been fully paid and satisfied.

Done in open in court this 20th day of June, 1922.

THOS. M. REED,  
Judge.

Filed in the District Court, District of Alaska,  
First Division. Jun. 21, 1922. J. H. Dunn, Clerk.  
By ———, Deputy. [28]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1375-A.

JOSEPHINE G. COOK VALENTINE,  
Plaintiff,

vs.

EMERY VALENTINE,  
Defendant.

**Decree.**

This matter coming on regularly for trial upon the issues made between the plaintiff and defendant, and by plaintiff's complaint and defendant's answer and cross-complaint; and plaintiff appearing in person and by her attorneys H. L. Faulkner and Henry Roden, and the defendant appearing in person and by his attorney J. H. Cobb; and the Court having heard the evidence and testimony herein, and being fully advised in the premises; and having made its findings of fact and conclusions of law herein; and the same having been duly filed with the Clerk of the above-entitled Court,—

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the bonds of matrimony now and heretofore existing between plaintiff and defendant be, and the same are hereby dissolved; and that the name of the plaintiff be, and the same is hereby changed to Josephine G. Cook; and that the plaintiff have and recover of and from the defendant the sum of Seventy-five hundred Dollars (\$7500.00) permanent alimony, payable at the rate of One Hundred Twenty-five (\$125.00) Dollars per month on or before the tenth day of every month hereafter, and her costs and disbursements herein, and that the defendant, Emery Valentine, deed and convey to the plaintiff all the mining property which he holds in trust for the plaintiff, to wit: The Falls and Diana patented lode mining claims and that he cancel and fully satisfy the mortgages which he holds upon

plaintiff's property, to wit: Lot No. 1, Block No. 45 of the Town of Douglas, Alaska, and Lot No. 3 in Block No. 108 of the Town [29] of Juneau, Alaska; and that the cross-complaint of the defendant herein be dismissed.

And it is further ordered that the Court retain jurisdiction of the matter of the alimony herein until the same has been fully paid and satisfied.

Done in open court this 20th day of June, 1922.

THOS. M. REED,

Judge.

Filed in the District Court, District of Alaska, First Division. Jun. 21, 1922. J. H. Dunn, Clerk.  
By \_\_\_\_\_, Deputy.

Entered Court Journal No. R, page 264 [30]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1375-A.

JOSEPHINE G. VALENTINE,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

### **Assignments of Error.**

Now comes the defendant above named and assigns the following errors upon which he will rely in the Appellate Court on his appeal herein, to wit: [224]

## IV.

The Court erred in that part of the decree directing and commanding the defendant to deed and convey to the plaintiff the mining claims known as the Falls and Diana Lode Mining Claims.

## V.

The Court erred in that part of the decree directing and commanding the defendant to cancel and fully satisfy the mortgages held by him upon Lot No. 1, in Block No. 45, of the Town of Douglas, Alaska, and Lot No. 3, in Block No. 108, in the Town of Juneau, Alaska.

And for said errors and others manifest by the record herein, defendant prays that the decree appealed from [225] be modified by striking therefrom the provision therein for permanent alimony, or any alimony, and the provisions requiring the defendant to convey the mining claims and cancel the said mortgages, and further orders as to the Court may seem proper.

J. H. COBB,

Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division. Aug. 28, 1922. John H. Dunn, Clerk. By ———, Deputy. [226]



In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1375-A.

JOSEPHINE G. VALENTINE,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

**Petition for Order Allowing Appeal.**

Emery Valentine, defendant above mentioned, conceiving himself aggrieved by the judgment and decree entered herein on the 20th day of June, 1922, and having filed his assignment of error, hereby prays the Court to make and enter an order allowing an appeal from said Judgment and decree to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and to fix the amount of security to be given on said appeal to operate as a supersedeas, and that the clerk forward a complete transcript of the record herein to the clerk of the said Appellate Court.

J. H. COBB,

Attorney for Defendant.

Upon reading the above and foregoing petition for allowance of appeal:

**ORDER.**

IT IS ORDERED that the said appeal be, and the same is hereby allowed, and the amount of the bond to be given by the defendant to operate

as a supersedeas, is hereby fixed at the sum of \$7,500.00 *Dollars*.

Dated this the 28th day of August, 1922.

THOS. M. REED,

Judge.

Filed in the District Court, District of Alaska, First Division. Aug. 28, 1922. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. R, page 332. [227]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1375-A.

JOSEPHINE G. VALENTINE,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

**Citation on Appeal.**

United States of America,—ss.

The President of the United States to Josephine G. Valentine and H. L. Faulkner and Henry Roden, Her Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ pursuant to an appeal lodged in the clerk's office for the Dis-

strict Court of Alaska, Division Number one, in the cause wherein Emery Valentine is appellant and you are appellee then and there to show cause, if any there be, why the judgment and decree in said appeal mentioned should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 28th day of August, 1922, and of the Independence of the United States the one hundred and forty-ninth.

THOS. M. REED,  
Judge. [228]

Service of the above and foregoing citation on appeal is admitted this the 28th day of August, 1922.

H. L. FAULKNER,  
Attorney for Appellee.

Filed in the District Court, District of Alaska, First Division. Aug. 28, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [229]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1375-A.

JOSEPHINE G. VALENTINE,  
  
Plaintiff,  
  
vs.  
EMERY VALENTINE,  
  
Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, that we, Emery Valentine as principal and E. L. Pulver and John Reck as sureties, hereby acknowledge ourselves to be indebted and bonded to pay to Josephine G. Valentine the sum of Seventy-five Hundred (\$7500.00) Dollars, good and lawful money of the United States, for the payment of which sum, well and truly to be made, we hereby bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of this obligation is such, however, that whereas the above-bound Emery Valentine has taken an appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and decree rendered in said cause on the 20th day of June, 1922:

Now, if the said Emery Valentine shall prosecute his appeal to effect and pay all such damages and costs as may be awarded against him if he fail to make good his plea, then this obligation shall be null and void; otherwise to remain in full force and effect. [230]

Witness our hands this the 28th day of August, 1922.

EMERY VALENTINE.

E. L. PULVER.

JOHN RECK.



Approved as to form and sufficiency of sureties, and said bond to operate as a supersedeas from and after date of filing thereof. This the 28th day of August, 1922.

THOS. M. REED,  
Judge.

O. K.—H. L. FAULKNER,  
Atty. for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Aug. 28, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [231]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1375-A.

JOSEPHINE G. COOK VALENTINE,  
Plaintiff,

vs.

EMERY VALENTINE,  
Defendant.

**Praeipie for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please make up a transcript on appeal in the above-entitled cause, and include therein the following papers, for transmission to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Amended complaint, filed Dec. 9, 1916.
2. Answer and cross-complaint, filed Dec. 23, 1916.
3. Reply, filed Dec. 31, 1918.
4. Memorandum opinion, filed May 13, 1922.
5. Findings and conclusions, filed June 21, 1922.
6. Decree, filed June 21, 1922.
7. Bill of exceptions.
8. Assignments of error.
9. Petition of appeal and order allowing appeal.
10. Citation.
11. Bond.

Said transcript to be made up in accordance with the rules of the said Circuit Court of Appeals.

J. H. COBB,

Attorney for Emery Valentine, Defendant and Appellant.

Filed in the District Court, District of Alaska, First Division. Oct. 24, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [232]

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In the District Court for the District of Alaska,  
Division No. 1, at Juneau.

United States of America,  
District of Alaska,  
Division No. 1,—ss.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby

certify that the foregoing and hereto attached 232 pages of typewritten matter, numbered from one to 232, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, prepared in accordance with the praecipe of counsel for appellant, in cause No. 1375-A, on file in my office and made a part hereof, wherein Emery Valentine is defendant and appellant and Josephine G. Cook Valentine is plaintiff and appellee.

I further certify that said record is by virtue of an appeal and citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to One Hundred Three and 05/100 Dollars (\$103.05), has been paid to me by counsel for appellant.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 26th day of October, 1922.

[Seal]

JOHN H. DUNN,

Clerk.

By L. E. Spray,

Deputy.

[Endorsed]: No. 3943. United States Circuit Court of Appeals for the Ninth Circuit. Emery Valentine, Appellant, vs. Josephine G. Valentine, Appellee. Transcript of Record. Upon Appeal

from the United States District Court for the District of Alaska, Division Number One.

Filed November 21, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1375-A.

JOSEPHINE G. C. VALENTINE,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

**Stipulation as to Printing Transcript of Record.**

It is hereby stipulated by and between counsel for plaintiff and defendant in the above-entitled and numbered cause, as follows:

1. That the facts regarding defendant's ownership of the Falls and Diana Lode Claims referred to in Assignment of Error IV are as follows: Said claims were the property of Frank A. Cook, the former husband of plaintiff, at the time of his decease. Plaintiff was the administratrix of the



estate of Frank A. Cook, deceased, and said claims were sold under an order of sale to pay certain debts of the estate held and owned by the defendant. This sale occurred subsequent to the marriage of plaintiff and defendant. At this sale the claims were bought by defendant. Subsequently defendant executed a declaration of trust, declaring he held and owned said claims, and all proceeds therefrom for the use and benefit of his wife, the plaintiff herein.

2. The facts regarding the mortgages referred to in Assignment No. V are as follows: Said mortgages were executed by the plaintiff and her former husband, Frank A. Cook, upon the home in Juneau and a business house and lot in Douglas City. Subsequent to the death of Frank A. Cook, defendant purchased said mortgages, and has ever since held the same and they are unpaid and have never been cancelled.

It is further stipulated that the Clerk of the United States Circuit Court of Appeals shall print as a part of the record, this stipulation, and shall omit from the printed record the following:

Assignments of Error Numbers I, II and III, and the entire Bill of Exceptions, or certified transcript of the testimony, the facts above stipulated being all that it is necessary for the Court to consider in passing upon assignments of error Num-

bers IV and V, which alone will be relied upon in the Appellate Court.

H. L. FAULKNER,  
HENRY RODEN,  
Attorneys for Plaintiff.  
J. H. COBB,  
Attorney for Defendant.

[Endorsed]: No. 3943. United States Circuit Court of Appeals for the Ninth Circuit. Emery Valentine vs. Josephine G. Valentine. Stipulation Re Printing Transcript of Record. Filed Nov. 27, 1922. F. D. Monekton, Clerk.



IN THE  
**United States Circuit  
Court of Appeals**

**FOR THE NINTH CIRCUIT**

THOMAS W. MILLER, Alien Property Custodian of the United States of America,  
*Appellee,*

v.

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,  
*Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

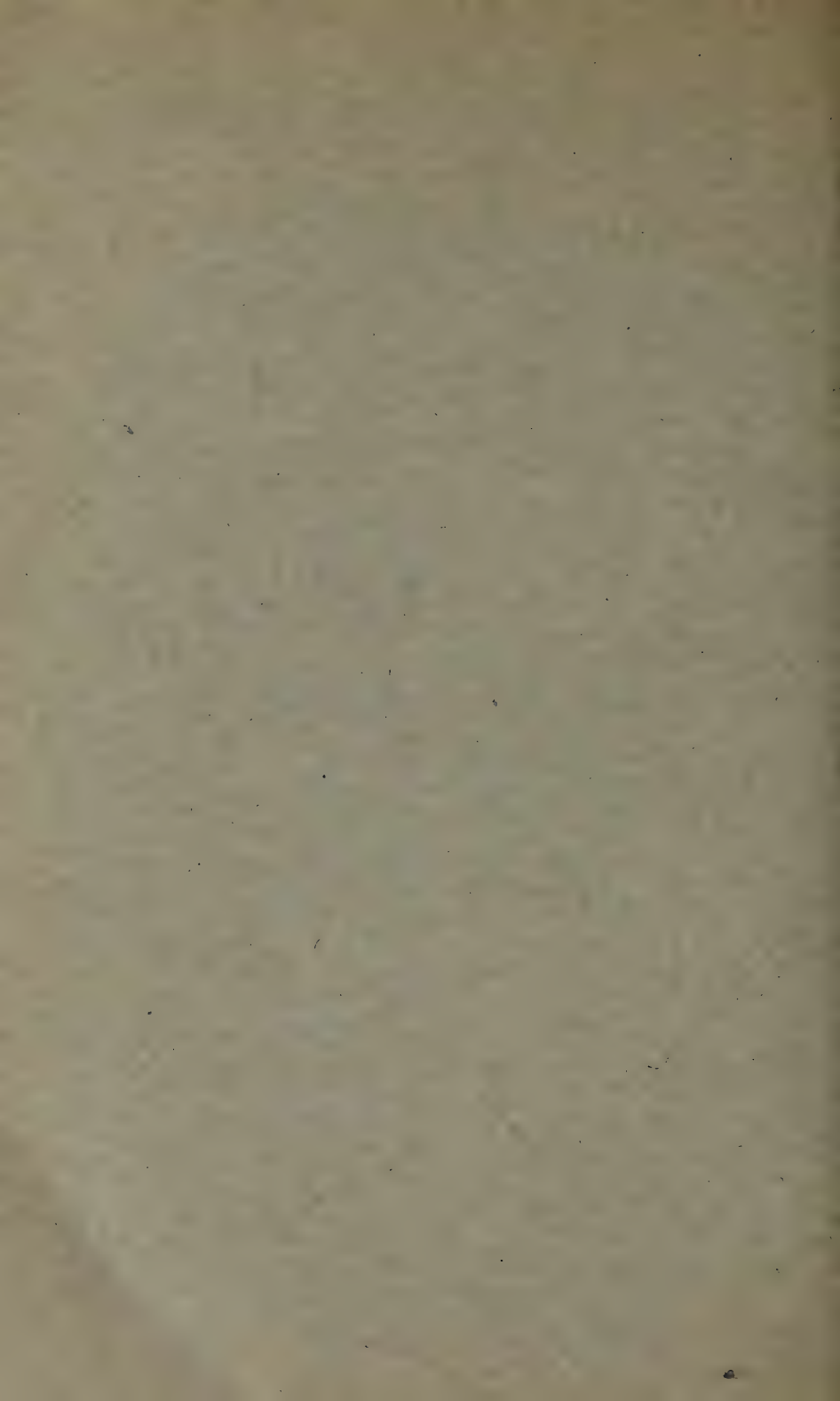
**BRIEF FOR APPELLANTS**

L. L. THOMPSON,  
*Attorney General of the State of Washington,*

JOHN H. DUNBAR,  
*Assistant Attorney General of the State of Washington,*  
*Attorneys for Appellants.*

GUIE & HALVERSTADT,  
*Of Counsel.*





No.....In Equity

IN THE

United States Circuit  
Court of Appeals

FOR THE NINTH CIRCUIT

---

THOMAS W. MILLER, Alien Property Custodian of the United States of America,  
*Appellee,*

v.

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,  
*Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

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**BRIEF FOR APPELLANTS**

---

L. L. THOMPSON,  
*Attorney General of the State of Washington,*

JOHN H. DUNBAR,  
*Assistant Attorney General of the State of Washington,*  
*Attorneys for Appellants.*

GUIE & HALVERSTADT,  
*Of Counsel.*



No. .... In Equity

IN THE

United States Circuit  
Court of Appeals

FOR THE NINTH CIRCUIT

---

THOMAS W. MILLER, Alien Property Custodian of the United States of America,  
*Appellee,*

v.

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,  
*Appellants.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

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**BRIEF FOR APPELLANTS**

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STATEMENT OF THE CASE.

The appellee alleges in his complaint in substance that during the recent World War, and prior thereto, a great many workmen, who were alien



enemies in the State of Washington, were killed while engaged in extra hazardous occupations, which entitled their beneficiaries to a pension by virtue of the Workmen's Compensation Act of the State of Washington, being chapter 74, Laws of 1911 of Washington, and section 6604-1, *et seq.*, Rem. 1915 Code. The complaint further alleges that such beneficiaries lived in countries with which the United States was at war and for this reason the warrants here involved and which were made payable to the beneficiaries were not delivered to them. After a considerable space of time, the Department of Labor and Industries of the State of Washington, which department has charge of administering the Accident Fund created by the Workmen's Compensation Act, ceased to issue warrants payable to such beneficiaries, inasmuch as delivery thereof was impossible.

During the war, the alien property custodian, appellee herein, after an investigation, determined that the State of Washington had moneys in its possession belonging to alien enemies and made a demand upon the Department of Labor and Industries that such moneys be turned over to him. This demand was not complied with, and on or about August 1st, 1922, the alien property custodian, appellee herein, sued the State of Washington, Edward Clifford, Superintendent of the Department of Labor and Industries, and E. S. Gill, Supervisor of the Industrial Insurance Division, in the district court, praying that an order be issued directed to the United

States Marshal, directing him to seize the warrants here involved which were already issued, and that an order be issued citing the appellants to appear at a certain time and show cause why they should not deliver forthwith to the appellee the said warrants, and pay over to him the various amounts shown in the schedule attached to the complaint, and that all of the warrants and moneys described in the schedules attached to the complaint should be paid over to the appellee. The motion to dismiss was filed against this original complaint on the theory, among other things, that the district court had no jurisdiction of a suit against the state. This motion was sustained as to the State of Washington, and denied as to the other appellants, it being the theory of the learned court that the district court did not have jurisdiction of an action against the state, and therefore the state was dismissed from the action, but it was also the court's theory that the action, in so far as it was directed against Edward Clifford, Superintendent of Labor and Industries, and E. S. Gill, Supervisor of Industrial Insurance, was not in fact an action against the state. An amended complaint was then filed, practically similar to the original, except that the State of Washington was omitted as a defendant. A motion to dismiss was filed by the appellants, directed against the amended complaint, on the theory that the district court has no jurisdiction of this action as it was in reality a suit against the state and that the Trading with the Enemy Act, being chapter

106, Volume I, United States Statutes at Large, page 411, under the authority of which appellee instituted this action, does not apply to a state. This motion was denied by the district court and, the appellants having refused to plead further, a judgment was entered in conformity with the prayer of the complaint from which this appeal is taken.

## SPECIFICATIONS OF ERROR.

## I

The court erred in denying appellants' motion to dismiss the bill of complaint, for the reason that said court did not have jurisdiction of the appellants or the subject matter of the action.

## II

The court erred in entering judgment in favor of the appellee and against the appellants, for the reason that said court did not have jurisdiction of the appellants or the subject matter of the action.



## ARGUMENT.

## I

THE DISTRICT COURT HAS NO JURISDICTION OF AN  
ACTION AGAINST A STATE.

Rev. Stat. section 687, Act of September 24, 1789, c. 20, sec. 13, 1 stat. 80, provides as follows:

“The supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is party, except between a state and its citizens, or between a state and citizens of other states or aliens, in which latter cases it shall have original but not exclusive jurisdiction.”

In construing this section, in the case of *United States v. Texas*, 143 U. S. 621 (643), the court said:

“That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a State, is clear; for by the Revised Statutes it is declared—as was done by the Judiciary Act of 1789—that ‘the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction.’ Rev. Stat. Sec. 687; Act of September 24, 1789, c. 20, sec. 13; 1 Stat. 80. Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?”

Again, in the case of *Title Guaranty & Surety Company v. Guernsey*, 205 Fed. 94, the court said (p. 95):

“(1) It is a fundamental rule of public law that a sovereign state cannot be sued without its consent, and that no judgment can be entered against it in any court without express legislative authority therefor. In recognition of this elementary principle article 2, sec. 26, of the Constitution of the State of Washington declares:

“ ‘The Legislature shall direct by law in what manner and in what courts suits may be brought against the state.’

“And the Legislature has provided that such suits shall be begun in the superior court of Thurston county. 1 Rem. & Bal. Code, sec. 886. In the face of these provisions and article 11 of the amendments to the Constitution of the United States, it is idle to assert that this court has jurisdiction of a suit against the state, or that it can enter any judgment whatever against it. *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960.

“(2) It would have, perhaps, been more seemly had the Attorney General challenged the jurisdiction of the court at the threshold; but the immunity of the state from suit can only be waived by the Legislature, and it is in no manner bound or estopped by the acts of its officers. As said by the court in *Stanley v. Schwalby*, *supra*:

“ ‘Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers.’ ”

Section 17 of the Trading with the Enemy Act, approved October 6, 1917, found in Volume 40, part I, page 411, Statutes at Large, reads as follows:

“That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court, as provided in sections 128 and 238 of the Act of March 3, 1911, entitled ‘And to codify, revise and amend the laws relating to the judiciary.’ ”

There may be some contention that this repeals Rev. Stat. section 687, *supra*, but it will be noticed that there is no express repeal anywhere in the Trading with the Enemy Act, *supra*. However, the rule of law is well settled that repeals by implications are not favored in law and there must be such a manifest and total repugnance that the two enactments cannot stand before a repeal by implication will be allowed. This rule is well stated in section 247, Volume I, Lewis Sutherland’s Statutory Construction, as follows:

“When some office or function can, by fair construction, be assigned to both acts, and they confer different powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject \* \* \*. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to each other, or when in the latter statute some express notice is taken of the former plainly indicating an intention to repeal it, and where two acts are seemingly repugnant they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication.”

Manifestly, there is no such repugnance, or notice in the latter statute of the former indicating an intention to repeal it, between a statute which gives the United States Supreme Court exclusive jurisdiction of cases in which the state is a party and a statute which gives district courts jurisdiction to enforce the provisions of the Trading with the Enemy Act.

## II

### THIS IS AN ACTION AGAINST THE STATE OF WASHINGTON.

The Workmen's Compensation Act of the State of Washington was enacted by virtue of the police power, and its constitutionality was sustained on that ground. *State v. Mountain Timber Company*, 243 U. S. 219. The preamble to chapter 74, Laws of 1911, is as follows:

“An Act relating to the compensation of injured workmen in our industries, and the compensation to their dependents where such injuries result in death, creating an industrial insurance department, making an appropriation for its administration, providing for the creation and disbursement of funds for the compensation and care of workmen injured in hazardous employment, providing penalties for the non-observance of regulations for the prevention of such injuries and for violation of its provisions, asserting and exercising the police power in such cases, and, except in certain specified cases, abolishing the doctrine of negligence as a ground for recovery of damages against employers, and depriving the courts of jurisdiction of such controversies, and repealing sections 6594, 6595 and 6596 of Remington and Ballinger's Annotated Codes and Statutes of Washington, relating to employes in factories, mills or work-



shops where machinery is used, actions for the recovery of damages and prescribing a punishment for the violation thereof."

Section 1, chapter 74, Laws of 1911, being section 6604-1, Rem. 1915 Code, contains a declaration of policy reciting that the common law system governing the remedy of workmen against employers for injuries received in hazardous work, is inconsistent with modern industrial conditions and in practice proves to be economically unwise and unfair. That the remedy of the workman has been uncertain, slow and inadequate, that injuries in such employments, formerly occasional, have become frequent and inevitable, and that the welfare of the state of Washington depends upon its industries, and even more upon the welfare of its wage workers, "the state of Washington therefore exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Section 2 provides that while there is hazard in all employment, certain employments have come to

be and are recognized as being inherently constantly dangerous. Such employments are designated as "extrahazardous," and those included within the act are enumerated in section 2.

The third section contains a definition of terms not here important.

Section 4 contains a schedule of contribution classifying the industries under the act in the degree of their award, and specifying the percentage that such industries shall pay as premiums on their pay-rolls, into a fund designated as the accident fund.

Section 5 contains a schedule of the compensation to be awarded out of the accident fund, which is the fund composed of the premiums paid in by virtue of section 4 to each injured workman or to his family or dependents, in case of his death, and declares that except as in the act otherwise provided, such payment shall be in lieu of any and all rights of action against any person whatsoever.

Section 8 provides that in case any employer shall default in any payment to the accident fund, the sum due shall be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy.

Section 10 provides that no money paid or payable under this act out of the accident fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, charged, nor even

be taken in execution or attached or garnished, nor shall the same pass to any other person by operation of law.

Section 12 provides for the filing of claims by the injured workman or his dependents or beneficiaries in case of his death, and provides that no application shall be valid unless filed within one year after the date upon which the injury occurred or the right thereto accrued.

Section 20 provides that any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interests under this act, may have the same reviewed by a proceeding for that purpose in the nature of an appeal initiated in the superior court of the county of his residence.

Section 21 creates a department to administer the act.

Section 24 provides that the department shall have power to promulgate certain rules for the purpose of administering the act.

Section 26 provides that disbursements out of the funds shall be made only upon warrants drawn by the state auditor upon vouchers therefor transmitted to him by the department and audited by him, and that the state treasurer shall pay every warrant out of the fund upon which it is drawn. It also provides that the state treasurer shall be liable upon his official bond for the safe custody of the moneys and securities of the accident fund, "but all the provi-

sions of an act approved February 21, 1907, entitled 'An act to provide for state depositories and to regulate the deposits of state moneys therein,' shall be applied to said moneys and the handling thereof by the state treasurer."

Section 29 appropriates the sum of \$1,500,000.00 out of the general fund for the administrative expenses of the department in administering the act.

Section 31 provides that in case the act shall be hereafter repealed, all moneys which are in the accident fund at the time of the repeal shall be subject to such disposition as may be approved by the legislature.

The accident fund is, in fact, a public fund and partakes "of the dual nature of a tax for revenue and a tax for the purposes of regulation." *State v. Mountain Timber Co., supra*. This fund is thus derived from involuntary contributions exacted by the state under its police power, and partakes of the nature of a tax. The sections of the workmen's compensation act referred to, *supra*, show clearly that it is, in fact, a public fund, as it is kept by the state treasurer, disbursed only on state warrants in the manner provided by law. In case an employer defaults in his payments, an action may be maintained against him in the name of the state of Washington for the purpose of collecting these premiums. In case the workmen's compensation act shall be repealed, the moneys in the accident fund could only be disposed of by the state legislature. The accident



fund may also be used for the purpose of paying the administrative expense of the department of labor and industries, as shown by the general appropriation act of 1921, being chapter 155, Laws of 1921, which reads, in part, as follows:

“Director of Labor & Industry:

“Salary of Director .....	\$ 15,000.00
Salaries and Wages .....	323,225.00
Supplies, Material and Services.....	160,927.00
Capital Outlays .....	6,995.00

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Total from General Fund .....\$506,147.00”

FROM ACCIDENT FUND.

“Salaries and Wages .....	\$141,350.00
Supplies, Material & Service.....	71,450.00
Capital Outlays .....	2,735.00

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Total from Accident Fund.....\$215,535.00”

By virtue of sections 74 and 77, chapter 7, Laws of 1921, the control and management of this fund is placed in the hands of the director of labor and industries, and the supervisor of industrial insurance, appellants herein, to be disbursed in a manner prescribed by the workmen’s compensation act. It will also be noted that appellants are not sued in their individual capacity, but in their official capacity as state officers.

In the case of *Lankford v. Platte Iron Works Co.*, 59 L. ed., page 316, it appears that an action was instituted by the appellee against the Oklahoma state banking board and J. D. Lankford, the state bank commissioner. It appears that the appellee was the

holder of two certain time certificates of deposit issued by a certain bank. Subsequently, the bank commissioner took charge of the bank and all of its assets, and proceeded to wind up its affairs. A demand was made for the payment of the certificates upon the banking board, and the commissioner, out of the depositors' guaranty fund of the state, but payment was refused. The banking law of the state of Oklahoma provided that if there should be not sufficient funds available for the purpose of paying depositors of a defunct bank, that the banking board should be required to issue certificates of indebtedness for the amount of the deposit, to be known as depositors' guaranty fund warrants of the state of Oklahoma, as provided by section 3, article 2, chapter 31, Session Laws of Oklahoma for 1911, and that the banking board be required to levy an assessment against the capital stock of each and every trust company organized and existing under the laws of Oklahoma for the purpose of increasing such depositors' guaranty fund and pay the depositors and the depositors' guaranty fund warrants of the state of Oklahoma. It was contended on behalf of the appellant that this is a suit against the state and that the appellants have no personal interest therein, and are being sued in their official capacity as agents of the state. On behalf of the appellee it was urged that this was not an action against the state, because an action against a state officer to compel him to perform duties prescribed by law is not an action against the state,

and that an officer who refused to obey the laws does not stand for the state within the meaning of the Federal Constitution. It is also asserted by the appellee that the depositors' guaranty fund is not under the executive and legislative control of the state and cannot be used by either for any purposes whatever, but can be used solely for the purpose of paying depositors of failed banks. The court then goes on to state that "where the state should vest the title to the fund for the purpose of its administration was immaterial to the essence of the power to create the fund. Whether the state should commit it to the mere ministerial administration of the bank commissioner and banking board, and subject them to controversies with depositors, or draw around them the circle of its immunity, was a matter within its competency to determine, and we are brought to the question of interpretation—which has the state done?" The court then goes on to state that under the law the banking board is composed of the bank commission and three other persons, and that the board shall have supervision and control of the depositors' guaranty fund, which shall have power to adopt all necessary rules and regulations not inconsistent with law for the management and administration of the fund. The fund is created by levying against the capital stock of each and every bank organized and existing under the laws of the state, by an annual assessment, the fund to be used solely for the purpose of liquidating deposits of failed banks and retiring warrants

provided for in the act, and if there be a deficiency, depositors' guaranty fund warrants may be issued, and an additional levy made against the member banks for the purpose of paying these certificates. And so it is insisted by the appellee that the plain commands of the statute, to which obedience is imposed and is necessary to fulfil the purpose of the law, which is to secure the full repayment to depositors, and therefore a suit by depositors is not a suit against the state, but a suit to compel submission by the officers of the state to the laws of the state, accomplishing at once the policy of the law and its specific purpose. In holding that this was, in fact, a suit against the state, the court said:

“There is strength in the contentions and we are not insensible to it, but there may be more complexity in fulfilling the scheme of the statute than the language of counsel exhibits, and it may be embarrassed if not defeated by subjecting the banking board to incessant judicial inquiries of its administration. We certainly cannot assume that it will not do its duty and provide the ultimate payment of all depositors. To this result the state makes itself an active agent. It is given a lien upon the assets of insolvent banks and upon all liabilities against their stockholders, officers, directors, and against other persons, which may be enforced by the state for the benefit of the fund which its law has created.”

In discussing the case of *Murray v. Wilson Distilling Co.*, 213 U. S. 151, in the *Lankford* case, *supra*, the court said:

“The case, it is true, has some differences from that at bar. There the state was the owner of the



property committed to the commissioners for disposition, and was also the original debtor. Here the property is that of the contributing banks, and is accumulated in a fund for the security of their respective depositors. These are differences, but there are substantial resemblances. In that case officers were appointed to administer the property and liquidate and pay the demands against it, and this was the specific direction of the law, marking the beneficiaries, and apparently making them the exclusive parties in any proceedings to enforce the law. In this case officers are appointed having even a greater power. They are not only empowered to liquidate the deposits or other indebtedness of failed banks, but to levy assessments on other banks to make up any deficiency. Therefore, as the state was said to be a necessary party in the cited case, the state can be said to be a necessary party in the pending case because of its interest that the fund which it has caused to be created in pursuance of its policy shall be administered by the officers it has appointed rather than by judicial tribunals."

Again, in referring to the case of *State ex rel. Taylor v. Cockrell*, 27 Okla. 620, 112 Pac. 1000, in the *Lankford* case, *supra*, the court said:

"The title of such depositors' guaranty fund vests in the state, just as much so as the common school lands or the proceeds of the sale of the same  
\* \* \* ."

"From this decision it appears that the law intended to give to the state as definite a title to the depositors' guaranty fund as to the common school fund \* \* \* . In both cases there were ultimate beneficiaries—in the pending case, the bank depositors; in the other case, the creditors of the dispensary. And the purpose of the law—or, if you will, the command of the law—in each case was or is the satisfaction of the claims of those beneficiaries. The fund,

having this ultimate destination, does not take its administration from the officers of the state, or subject them to judicial control. We cannot assume that it will not be faithfully managed and applied.”

Section 4 of the workmen’s compensation act of the state of Washington, provides:

“If, at the end of any year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the first day of February of the following year.”

The analogy between the accident fund here involved and the state guaranty fund involved in the *Lankford* case, *supra*, may readily be seen. The accident fund is composed of premiums levied by the state in the nature of a tax by virtue of its police power for a specific purpose, namely, paying injured workmen and their dependents for injuries, and in case of any deficiency in any particular class in the accident fund, an additional levy may be made by the state for the purpose of taking care of this deficiency, and it is submitted that the state of Washington has as much title to the accident fund here involved as the state of Oklahoma had to the state guaranty fund involved in the *Lankford* case.

In the case of *State ex rel. Pierce County v. Superior Court*, 86 Wash. 685, it appeared that a taxpayer of Pierce County began an action in the superior court of Thurston County, making parties defendant, among others, C. W. Clausen, as State Auditor, and W. R. Roy, as State Highway Commis-

sioner, praying that a certain contract entered into between the county and the paving company be adjudged void, that work be stopped, and that the state highway commissioner be enjoined from certifying for payment to the state auditor any sum of money earned on the contract. This action was then instituted for the purpose of procuring a right of prohibition against the superior judge of Thurston County, seeking to prohibit him from proceeding further in the first action. In holding that this second action was, in fact, an action against the state, the court, on page 688, said :

“The suit in question, while in form a suit against certain of its executive officers in their representative capacities, is in essence and effect a suit against the state. The suit is instituted to restrain these officers, the one from certifying that certain sums payable out of the state treasury has been earned in the performance of a contract in which the state has an interest, and the other from drawing warrants on the state treasury for the payment of such certificates, if any are so presented to him. The funds involved are the funds of the state. The officers sought to be enjoined have no interest in the funds. They are merely the agents of the state by and through whom the state acts. They are not charged with acting in excess of the authority conferred upon them by law, nor is it charged that the law under which they are acting is for any reason void. The charge is, on the contrary, that a contract in which the state has an interest, and which, if valid, makes a charge upon the state’s funds, is void because of fraud in its inception. Clearly we think such a suit, even though brought against its officer, must in effect be a suit against the state.”

The language there used is applicable to the case at bar, as the funds here involved are funds of the state. The officers here have no interest whatever in the Accident Fund and merely act as agents of the state in the manner prescribed by state laws. Nor is it charged that they are acting in excess of their authority or that the law under which they are acting is void.

The case of *Oregon v. Hitchcock*, 202 U. S. 60, was an action instituted by the state of Oregon against Ethan A. Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office, to restrain them from allotting or patenting to any Indians, or other persons, certain lands in the Klamath Indian Reservation and praying that the title to such lands be decreed to be in the State of Oregon. In holding that this was, in fact, a suit against the United States, the court, on page 69, said:

“The question of jurisdiction in a case very similar to this was fully considered in *Minnesota v. Hitchcock*, *supra*. There, as here, a State was plaintiff, and the suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections 16 and 36 in what was known as the ‘Red Lake Indian Reservation.’ This suit is brought by a State against the same officers, to restrain them from allotting and patenting in severalty swamp lands within the Klamath Indian Reservation. In that case we said (p. 387):

“‘Now, the legal title to these lands is in the United States. The officers named as defendants



have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.' "

So in the case at bar the appellants have no interest whatever in the outcome of this litigation, nor will it in any manner affect their interests. By the judgment in this case, appellants are ordered to deliver to appellee certain state warrants and also to show certain vouchers to appellee for which no warrants have been drawn. These warrants are drawn against a public fund in the state treasury, which consists of involuntary premiums exacted by the state by virtue of its police power from certain employers, and partake of the nature of a tax. It is thus readily seen that the only thing affected by this litigation is a state fund which will be materially lessened in case the appellee is successful. This will of necessity compel all employers of the state of Washington to pay a higher premium and will thus affect all the people of the State of Washington, as can readily be seen by

referring to the preamble of the Workmen's Compensation Act of this state, quoted *supra*.

In construing the South Carolina legislation controlling liquor, in the case of *Carolina Glass Co. v. South Carolina*, 240 U. S. 307 (314) the court said:

“Under the provisions of the Constitution (Art. VIII, Sec. 11) and statutes (25 Stat. 463) the county dispensaries are conducted ‘under the authority and in the name of the State.’ Therefore, the officers in charge of them are agents of the State and the funds arising from the sale of liquors through them are the funds of the State, and the debts due for goods sold to them are the debts of the State. In exercising the powers conferred upon it by the legislature, the Dispensary Commission is also the agent and representative of the State, ‘subject to no interference, except that of the General Assembly itself,’ and a suit brought against it is, in effect, a suit against the State. *State v. Dispensary Commission*, 79 S. Car. 316, 329, 60 S. E. Rep. 928.”

In the case of *Pitcock v. State*, 91 Ark. 527, an action was instituted against the Superintendent of the State Penitentiary and other state officers to restrain them from violating the provisions of a contract. In holding that this was an action against the state, on page 538, the court said:

“This court in the *McConnell* case, *supra*, held that that was not a suit against the State because the Penitentiary Board had executed a valid and then subsisting contract with the plaintiff, but was attempting without legal authority to break it by a refusal to perform it. That distinction is untenable. The Penitentiary Board is created by statute as the agent of the State to manage and provide for working the convicts of the State. That board has the power

to make contracts for the State, and it is the sole agent of the State in the performance of such contracts. The board does not perform merely ministerial acts; what it does involves judgment and discretion, and all that it does for the State. The State can, under the present statute, make and perform contracts with reference to the management of convicts only through the agency of this board. Therefore, an injunction against the board restraining it from violating a contract necessarily results in requiring the board, and through it the State, to specifically perform its contract."

The duties of the appellants here are not ministerial in character, but their acts involve discretion to such an extent that they are quasi judicial in character, as evidenced by section 6604-20, Rem. 1915 Code, which reads in part as follows:

"Any employer, workman, beneficiary or person feeling aggrieved at any decision of the department affecting his interest may have the same reviewed by a proceeding for that purpose in the nature of an appeal initiated in the superior court of the county of his residence \* \* \* \*."

In the case of *Lovett v. Lankford*, 145 Pac. 767, it appeared that the plaintiff deposited some moneys with a certain bank which was a member of the State Bank Guaranty Fund, which bank subsequently failed. An action was then instituted against the State Bank Commissioner to recover from the Guaranty Fund the amount of the deposit. In holding that this was an action against the state, the court, on page 769, said:

"It cannot be questioned that a judgment in this case in favor of plaintiffs in error would directly

affect the state and would, in effect, be a judgment against the state and would require the subjection of state funds to satisfy said judgment.”

The State Guaranty Fund does not partake of the nature of a state fund as much as the Accident Fund here involved. The Guaranty Fund is composed of moneys voluntarily put up by member banks for the purpose of taking care of depositors of member banks that have failed, whereas the Accident Fund partakes of the nature of a tax and is involuntarily extracted from certain employers by the state by virtue of its police power.

In the case of *In re State of New York*, Sup. Ct. Rep. 41, p. 588, 256 U. S. 490, a libel was filed against three boats for damage caused by a collision, and damage was also asked against Ed S. Walsh, Superintendent of Public Works of the State of New York, who, it was alleged, was operating said boats. In holding this a suit against the state the court, on page 590, said:

“As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record (*Osborn v. U. S. Bank*, 9 Wheat. 738, 846, 850, 857, 6 L. Ed. 204) has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.  
\* \* \* \*

“Thus examined, the decided cases have fallen into two principal classes, mentioned in *Pennoyer v.*



*McConnaughy*, 140 U. S. 1, 10, 11 Sup. Ct. 608 (35 L. Ed. 363):

“The first class is where the suit is brought against the officers of the state, as representing the state’s action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts (citing cases). The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit \* \* \* is not, within the meaning of the Eleventh Amendment, an action against the state.’

“The first class, in just reason, is not confined to cases where the suit will operate so as to compel the state specifically to perform its contracts, but extends to such as will require it to make pecuniary satisfaction for any liability. *Smith v. Reeves*, 178 U. S. 436, 439, 20 Sup. Ct. 919, 44 L. Ed. 1140.”

### III

#### THE TRADING WITH THE ENEMY ACT DOES NOT APPLY TO A STATE.

Assuming that this court should not agree with the two previous arguments, it is submitted that the provisions of the trading with the enemy act hereinafter quoted do not apply to a state.

The appellee claims authority to institute this action by virtue of subdivision C, section 7, of the Trading with the Enemy Act, *supra*, which reads as follows:

“If the president shall so require, any money or other property owing to, belonging to, or held for, by,

on account of, on behalf of, or for the benefit of an enemy, or ally of an enemy, not holding a license granted by the president hereunder, which the president, after investigation shall determine is so owing, or so belongs, or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian."

Section 2, subdivision C, of the Trading with the Enemy Act, defines the word "person" as follows:

"The word 'person,' as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic."

It will be contended that the phrase "body politic" includes a state. It is rather difficult to find any fixed definition for this phrase. In the case of *Warner v. Beers*, 23 Wend. 103 (121), the court said:

"Such associated bodies as were, in the language of the constitution, at the time of its adoption by the people in January, 1822, called *bodies politic and corporate*, had been known to exist as far back at least as the time of Cicero; and Gaius traces them even to the laws of Solon of Athens, who lived some five hundred years before. Pothier's Pand. of Just. Book 3, 109, Paris Ed. 1823. These associated bodies, or communities of individuals, with certain rights and privileges belonging to them by law in their aggregative capacity, were styled by the Romans *Collegium*, and sometimes *universitas*; as *Collegia Tibicinum*, *Collegia Aurificum*, *Collegia Architectorum*; the society, corporation or community of Flute Players, Goldsmiths, Architects, etc. Id. Book 20, p. 110. The terms used by one of the Roman jurisconsults to describe the nature of such a corporation, or associated body of individuals, under the laws of the republic, are perhaps as appropriate as any general language which can be used to describe a corporation

aggregate at the present day, without referring to the specific object for which any particular corporation is organized. I have thus translated it from the Latin of the Digest: 'But those who are permitted to form themselves into a body under the name of a corporation, society, or other community, have within their peculiar jurisdiction, as in a similar case of the republic, property in common, and a common chest or treasury, and an agent or head of the corporation or society, by whom, as in the republic, whatever is necessary to be done for the benefit of the community may be transacted.' "

Again in the case of *Coyle v. MacIntyre*, 40 Am. St. Rep. 109 (115), in defining this term, the court said:

"A municipal corporation may be defined to be a body politic, incorporated and established by law to assist in the civil government of the state, with delegated authority to regulate and administer the local or internal affairs of a city, town, or district which is incorporated.

" 'A body politic,' says Lord Coke, 'is a body to take in succession, formed as to its capacity by policy', and is therefore called by Littleton (secs. 4, 13) a body politic. It is called a corporation or body corporate because the persons are made into a body politic and are of capacity to take, grant, etc., by a particular name."

See also *Coyle v. Gray*, 30 Atl. 728 (731).

These definitions would seem to indicate that the legal subdivisions of a state were bodies politic, but not the state itself. Black's Law Dictionary defines a body politic as follows:

"A term applied to a corporation which is usually designated as a body corporate and politic. The term is particularly appropriate to a public corpora-

tion invested with powers and duties of government. It is often used in a rather loose way to designate the state or nation or sovereign power or government of a county or municipality, without distinctly connoting any express and individual corporate character."

Again, in 8 Corpus Juris, page 1137, we find the following text:

"A body politic is the collective body of a nation or state as politically organized or as exercising political functions; a corporation; a body to take in succession, framed as to its capacity by policy; it is formed by a voluntary association of individuals."

It will be noted that this definition states it is a collective body of a state or nation as exercising political functions, and not the state itself, there being a distinction between the government of a state and the state itself.

There is a distinction between the government and the state itself. In common speech and apprehension, they are usually regarded as identical and, as ordinarily the acts of the government are the acts of the state and come within the limits of its delegation of power, the government of the state is generally confounded with the state itself. The state itself, however, is an ideal person, intangible, invisible, immutable. The government is an agent and within the sphere of its agency, a personal representative. *Grunert v. Spalding*, 78 N. W. 606, citing and following *Poindexter v. Greenhow*, 114 U. S. 270.

We think it apparent, therefore, that if Congress had intended that the Trading with the Enemy Act



should apply to one of the states of this union, it would not have used the loose term "body politic," which seems to have no fixed definition, and which seems to be most often applied to legal governing bodies, but would have stated that the word "person" should be defined to include the state. In any event, when construing to include a state, one includes the collective body of a state, as politically organized, which is distinguishable from the state itself, which is, in fact, the appellant herein.

By virtue of section 16 of the Trading with the Enemy Act, *supra*, the district court is given jurisdiction to enforce the orders and demands of the Alien Property Custodian, with a right of appeal therefrom. If, as we contend, a state cannot be sued in the district court, it would seem to logically follow that Congress did not intend that this act should apply to a state, as it has provided no machinery to enforce demands against the state, which demands arose by reason of this special act, which was created for a special purpose.

#### IV

THE TRADING WITH THE ENEMY ACT IS NOT APPLICABLE TO A STATE WHERE PROPERTY SOUGHT IS NOT REDUCED TO POSSESSION DURING THE WAR.

The Workmen's Compensation Act of the State of Washington was enacted by virtue of the police power of the state. Preamble to chapter 74, Laws of 1911, *supra*; and *State v. Mountain Timber Com-*

*pany, supra.* Section 6604-10, Rem. 1915 Code, being a part of the Workmen's Compensation Act, provides in part as follows:

"No money paid or payable under this act out of the Accident Fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, charged, or ever be taken in execution, or attached, or garnisheed, nor shall the same pass to to any other person by operation of law \* \* \*."

It will thus be seen that this section is in direct conflict with certain portions of the Trading with the Enemy Act. The rule is well settled that where an act of Congress and a state statute are in conflict, the act of Congress is controlling if Congress has power to legislate on that particular subject; and it is equally well settled that the state alone has power to legislate on subjects relating to police power. *Hammer v. Dagenhart*, 247 U. S. 275; *Ex Parte Guerra*, 110 Atl. 224. However, this rule does not obtain in time of war or other great public peril, as shown by the following excerpt from *United States v. Hicks*, 256 Fed. 707:

"Accurately speaking, the conduct of the defendant is of that character which ordinarily could only come under the general police power constitutionally reserved to the states by the tenth amendment, and is not within the legislative power of Congress, except in time of war or other great public peril \* \* \* \* \*"

The reason for this exception to the states' sole right to legislate on subjects relative to the police power is that an emergency exists in time of war that

renders it necessary to the safety of the nation that Congress should have extraordinary powers to preserve the existence of the nation. However, when the reason for this exception ceases to exist, namely, at the end of the war, the exception itself no longer exists, and as no action was taken by the appellee to reduce his demand to possession until after the treaty of peace had been concluded, it is submitted that section 6604-10, *supra*, being a state police power measure, is controlling and that a congressional act passed during the war is no longer controlling over it after the emergency ceases to exist, to-wit, after the end of the war. This is a view taken by the supreme court of the United States in *Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146. In that case it appeared that Congress had passed the war time prohibition act, the constitutionality of which was attacked. It was admitted that the United States lacks the police power, as shown by the following excerpt, on page 156:

“That the United States lacks the police power and that this was reserved to the states by the tenth amendment, is true.” But it was contended that under the war time emergency, Congress had power to regulate and prohibit the liquor traffic, as shown by the following quotation from page 155:

“The constitution did not confer police power upon Congress. Its power to regulate the liquor traffic must therefore be sought for in the implied war powers; that is, the power ‘to make all laws which shall be necessary and proper for carrying into execu-

tion' the war powers expressly granted. Article I, section 8, clause 18."

It was there contended that inasmuch as the armistice had been signed, the emergency ceased to exist and that a congressional act on the police power, enacted by virtue of its war time power, was no longer controlling because the emergency ceased to exist, although in that particular case peace had not been formally declared by treaty, as it has in this. In answering this contention, on page 163, the court said:

"Conceding, then, for the purposes of the present case, that the question of the continued validity of the war prohibition act under the changed circumstances depends upon whether it appears that there is no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, it remains to be said that on obvious grounds every reasonable intendment must be made in favor of its continuing validity, the prescribed period of limitation not having arrived; that to Congress in the exercise of its powers, not least the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded; and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued. In view of facts of public knowledge, some of which have been referred to, that the treaty of peace has not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it can not even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid."



To recapitulate, it is therefore respectfully submitted,

1. That district courts do not have jurisdiction in an action wherein a state is a party.

2. That this is an action against the state.

3. That the Trading with the Enemy Act does not apply to a state.

4. That inasmuch as the emergency of war, in this case, had ceased to exist at the time this action was instituted, Congress has no power to pass an act in direct conflict with a state statute enacted by virtue of the police power of the state.

L. L. THOMPSON,

*Attorney General of the State of Washington.*

JOHN H. DUNBAR,

*Assistant Attorney General of the State of Washington,*

*Attorneys for Appellants.*

GUIE & HALVERSTADT,

*Of Counsel.*

IN THE

**United States Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

---

EMERY VALENTINE,

*Appellant,*

*vs.*

JOSEPHINE G. COOK

(nee Valentine),

*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT FOR  
ALASKA, DIVISION NUMBER ONE.

---

**Brief for Appellant**

---

J. H. COBB,  
*Attorney for Appellant.*

---



IN THE  
United States Circuit Court of Appeals  
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**Brief for Appellant**

---

STATEMENT OF THE CASE

Appellee was plaintiff in the Court below and Appellant was defendant. For convenience, we will hereinafter refer to them as plaintiff and defendant respectively.

Plaintiff sued defendant for divorce on the grounds of cruel and inhuman treatment, and for



alimony. In addition to the grounds replied upon for a divorce, plaintiff alleged:

That there was no issue of the marriage between plaintiff and defendant, and that the plaintiff is the mother of an eleven year old child from a previous marriage with Frank A. Cook, and is charged with the care and maintenance of said child and of the custody and control of her property, said child being the sole heir of the said Frank A. Cook.

Plaintiff further alleged that she was the owner of Lot 3 in Block 108 in the town of Juneau on which there is a mortgage of \$1,400.00 or thereabouts, and in which the plaintiff and defendant and said Madeline have lived since the marriage of the plaintiff and defendant; which said lot is alleged to be of the approximate value of \$5,000.00, the plaintiff's equity therein to be of the value of \$3,500.00; and that such property was necessary for the use of plaintiff for a residence for herself and minor child; that the conduct of the defendant was such as to be a menace to the health and safety of the plaintiff and her child.

It was further alleged in substance that the defendant was worth about \$85,000.00 and that he had an income of \$12,000.00 per annum, and that plaintiff was without other means than as above alleged.

The relief prayed for, was,

First, an injunction during the pendency of the suit enjoining the defendant from visiting or entering upon the premises above mentioned, or in any way molesting or interfering with the plaintiff and her minor child, and further restraining the defendant from disposing of any of his property.

Second, the dissolution of the marriage.

Third, for alimony in the sum of \$30,000.00 gross or \$4,000.00 per annum.

Fourth, that plaintiff's name be changed to Josephine G. Cook.

Fifth, for costs and disbursements. (Rec. p. 1-7).

The defendant filed an answer admitting all the allegations of the complaint except those relied upon for divorce, which were denied, and he further denied the value of the property which he alleged was not more than \$48,000.00, or that his income was greater than \$4,000.00. He also filed a cross-complaint asking for adivorce from the plaintiff which is unnecessary to state as it is immaterial for the purpose of this appeal. (Rec. p. 8-19).

The plaintiff filed a reply putting in issue the allegations of the cross complaint. (Rec. p. 21-22).

The Court made findings of fact and conclusions of law and entered decree in favor of the plaintiff granting the divorce prayed for and alimony in the sum of \$7,500.00, to be paid monthly at the rate of \$125.00 per month. (Rec. p. 30-36).

It incidentally developed in the testimony that defendant was the owner of certain indebtedness against the estate of Frank A. Cook, the plaintiff's former husband, which indebtedness was secured by a mortgage upon Lot 3, Block 108, in the town of Juneau, and upon a certain store building in Douglas City, Alaska, belonging to said estate. It also incidentally developed that defendant had bought at judicial sale, two certain mining claims formerly belonging to the Frank A. Cook estate, and made a declaration of trust in favor of the plaintiff for

said claims.

The Court thereupon further decreed that the defendant should deed and convey said mining claims, known as the Falls and Diana Lode Mining Claims, to the plaintiff, and to cancel and satisfy the mortgage held by him on Lot 1, Block 45, in Douglas City, and Lot 3, Block 108, in the town of Juneau. (Rec. p. 35-36).

Unfortunately the defendant has no appeal under the law from the decree granting the divorce of the plaintiff and the alimony as an incident thereto, (Leake vs. Leake, 156 Fed. 473) but he has an appeal from that portion of the decree commanding and directing him to deed to the plaintiff he mining property aforesaid and to cancel said mortgages, and the case is brought here for the purpose upon the following assignments of error.:

#### IV.

"The Court erred in that part of the decree directing and commanding the defendant to deed and convey to the plaintiff the mining claims known as the Falls and Diana Lode Mining Claims."

#### V.

"The Court erred in that portion of the decree directing and commanding the defendant to cancel and fully satisfy the mortgage held by him upon Lot 1 in Block 45 of the Down of Douglas, Alaska, and Lot 3 in Block 108 in the town of Juneau, Alaska." (Rec. pp. 36-37).

### ARGUMENT.

A complete transcript of the evidence heard on the trial, duly certified to and made a part of the record, was sent up to this Court, but not printed.



as it was immaterial to the question involved. A short statement of the facts that are material was stipulated by counsel, (Rec. pp 45-47) and are as follows:

"1. That the facts regarding defendant's ownership of the Falls and Diana Lode Claims referred to in Assignment of Error IV., are as follows: Said claims were the property of Frank A. Cook, the former husband of plaintiff, at the time of his decease. Plaintiff was the administratrix of the estate of Frank A. Cook, deceased, and said claims were sold under an order of sale to pay certain debts of the estate and owned by the defendant. This sale occurred subsequent to the marriage of plaintiff and defendant. Subsequently defendant executed a declaration of trust, declaring he held and owned said claims and all proceeds therefrom for the use and benefit of his wife, the plaintiff herein."

"2. The facts regarding the mortgages referred to in Assignment No. V., are as follows: Said mortgages were executed by the plaintiff and her former husband, Frank A. Cook, upon the home in Juneau and a business house and lot in Douglas City. Subsequent to the death of Frank A. Cook, defendant purchased said mortgages, and has even since held the same and they are unpaid and have never been cancelled."

That a judgment must be supported by the pleadings; must embrace only the issues submitted to the Court, and cannot go beyond them, is fundamental. The law is ably and clearly stated by Mr. Black in his valuable work on Judgments, Vol. 1, Section 242, and we quote it in full:

"Besides jurisdiction of the person of the de-



fendant and of the general subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant. In other words a judgment which passes upon matter entirely outside the issue raised in the record is so far invalid. 'Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials. First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its actions are void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A. and B. are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his

wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince anyone that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstances that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any merely arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground, that the parties have been heard, or have had the opportunity of hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels.' (Munday v. Vail, 34 N. J. Law, 418. To the same effect see Reynolds vs. Stockton, 43 N. J. Eq. 211, 10 Atl. Rep. 385).

"On this principle, where a widow brought suit for the sole purpose of having dower assigned her in her deceased husband's lands, the heirs at law, who were infants, being made defendants, and the court not only directed an assignment of dower, but of its own accord decreed a sale of the residue of the land belonging to the heirs, it was held that the court having exceeded its jurisdiction, the decree

of sale was void and might be collaterally attacked. (Seamster v. Blackstock, 83 Va. 232, 2 S. E. Rep. 36.) In these cases the court lacked jurisdiction of the subject or question which it assumed to pass upon because such matter was not submitted to it by the parties. But the same result would follow if, being invested with jurisdiction for a single purpose in a special statutory proceeding, it transcends the limit and attempts to exercise its powers for other purposes also. Thus where a statute provides for an action to foreclose a mortgage against a non-resident defendant, upon publication of summons, and authorizes a decree to be made for the sale of the mortgaged premises to satisfy the debt secured thereby, the court exhausts its jurisdiction in making the decree contemplated, and if, in addition thereto, it proceeds to award a personal judgment for a sum of money against the defendant, such judgment, being beyond its power, is void. (Wood v. Stanberry, 21 Ohio St. 149)."

If the court below had sustained the defendant's cross-complaint, he would, no doubt, upon the principles which governed in entering that part of the decree appealed from, have proceeded to foreclose the mortgage and cancel the declaration of trust!

The powers which the court has upon pronouncing a decree of divorce are prescribed by our statute. These are:

First, to provide for the care and custody of children.

Second, to provide for the payment for their nurture, support and education.

Third, for alimony, in gross or installments.



Fourth, for the delivery to the wife, when she is not in fault, of her personal property in possession or control of the husband at the time the judgment is given.

Fifth, for the appointment of trustees to collect, receive, expend, manage or invest any sum of money adjudged for the maintenance of the wife, or the support of the children committed to her care.

Sixth, to change the name of the wife, when she is not the party in fault. (Comp. Laws of Alaska, Sec. 1304.)

Manifestly there is nothing here giving the court power to cancel a mortgage held by the husband on property of the estate of the wife's former husband, for the benefit principally of a child of the wife and her former husband; nor to compel the deeding to the wife of real property held in trust for her by the husband. No power at all is given over real property in a divorce suit. Our statute differs in this respect from the former Oregon statute, under which the case of *Wetmore vs. Wetmore*, 67 Pac. Rep. 98, and the cases there cited, were decided. So that it is doubtful whether the court could have granted the relief it did, even had facts been plead and that relief prayed for.

We respectfully ask that that part of the decree cancelling the mortgages on Lot 1, Block 45, Douglas City, and Lot 3, Block 108, Juneau, and decreeing that defendant convey the Falls and Diana Lode Claims to plaintiff, be reversed, and said provisions stricken from the final decree of divorce, with costs to the Appellant.

J. H. COBB,  
Attorney for Appellant.





United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington, and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,

Appellants,

vs.

THOMAS W. MILLER, Alien Property Custodian of the United States of America,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court  
for the Western District of Washington,  
Southern Division.

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FILED

JAN 15 1923

F. D. MONCKTON,  
CLERK.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington, and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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\*Page-number appearing at foot of page of original certified Tran-  
script of Record.



In the District Court of the United States for the  
Western District of Washington, Southern  
Division.

No. 155—E.

THOMAS W. MILLER, Alien Property Custodian  
of the United States of America,  
Plaintiff,

vs.

STATE OF WASHINGTON, a Body Politic, ED-  
WARD CLIFFORD, Superintendent of the  
Department of Labor and Industries of the  
State of Washington, and E. S. GILL, Super-  
visor of Industrial Insurance of the Depart-  
ment of Labor and Industries of the State of  
Washington,  
Defendants.

### **Complaint.**

Comes now the above-named plaintiff and com-  
plaining of the above-named defendants alleges and  
says:

#### **I.**

That the above-named plaintiff is the duly ap-  
pointed qualified and acting Alien Property Custodian of the United States of America, appointed by the President of the United States under and by virtue of an act of Congress of the United States of America, known as the "Trading with the Enemy Act," passed on the 6th day of October, 1917, and the acts of Congress amendatory and supplementary

thereto, possessing all the powers granted by said acts of Congress and the executive orders issued in pursuance thereof.

## II.

That at all times herein mentioned the defendant, State of Washington was and is now a body politic, and one of the sovereign state of the United States of America, and the defendant, Edward Clifford is the duly appointed, qualified and acting Superintendent of Labor and Industries of the said State of Washington; and the defendant E. S. Gill [2] is the duly appointed, qualified and acting Supervisor of Industrial Insurance, and under said Superintendent of Labor and Industries of the State of Washington; that the said Department of Labor and Industries of the State of Washington has charge of the administration of the "Workingmen's Compensation Law" so called of the State of Washington; that it is the duty of said Edward Clifford and E. S. Gill as such officers of said Department of Labor and Industries of the State of Washington, to pass upon all claims arising under said Workingmen's Compensation Law, and direct the payment thereof out of the funds of the State of Washington collected and set aside for that purpose, to the parties entitled thereto.

That the said Edward Clifford, as Superintendent of Labor and Industries, and the said E. S. Gill, as Supervisor of Industrial Insurance, have the power, and it is their duty through and by means of the Division of Industrial Insurance of the Department of Labor and Industries of the State of Washington,

to exercise all the power and perform all the duties formerly vested in and required to be performed by the former Industrial Insurance Department of the State of Washington, and the former commissioners thereof; that all of said defendants are residents of the Judicial District above named.

### III.

That on the 6th day of April, 1917, by a joint resolution of Congress, a state of war was declared to exist between the United States and the Imperial German Government, and on the 7th day of December, 1917, by a joint resolution of Congress, a state of war was declared to exist between the [3] United States of America and the Imperial and Royal Austro-Hungarian Government; that the Kingdom of Bulgaria was an ally of Austria-Hungary and Germany in said war, and as such became subject to the provisions of said "Trading with the Enemy Act"; that between the time when the United States declared war against the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, as herein set forth, and the date of the passage of the resolution of Congress terminating such wars, reserving therein to the United States and the Alien Property Custodian all the rights held theretofore under the said, "Trading with the Enemy Act," sundry persons, being subjects of the Imperial German Government, the Imperial and Royal Austro-Hungarian Government and the Kingdom of Bulgaria, an ally of said two last-mentioned governments, domiciled with the State of Washington, and having dependants resid-

ing in the several nations of which they were subjects, were entitled, under the provisions of said Workingmen's Compensation Law, to certain moneys in the fund set aside by the State of Washington, for that purpose, the claims of said dependants upon said fund having been duly approved and allowed by the above-named officers, or their predecessors, in due course; that in many cases warrants for the payment of such funds were actually issued in the name of the beneficiaries but not delivered to them, but held by the said officers of said Department of Labor and Industries of the State of Washington, and in all other cases where the warrants were not issued, the claims were duly approved and allowed, and said beneficiaries became entitled to the issuance of warrants for the payment of the said several sums; that [4] attached hereto and made a part of this complaint, are three schedules respectively entitled, Schedule "A," Schedule "B" and Schedule "C."

That Schedule "A" contains a statement of all claims due to subjects of the Imperial German Government arising under the Workingmen's Compensation Law of the State of Washington; that Schedule "B" contains a statement of all claims due to subjects of the Imperial and Royal Austro-Hungarian Government arising under the Workingmen's Compensation Law of the State of Washington; that Schedule "C" contains a statement of all claims due to subjects of the Kingdom of Bulgaria arising under the Workingmen's Compensation Law of the State of Washington; that said



several schedules show severally the name of the deceased, the name and residence of the beneficiaries, the date of death, the total amount of warrants issued and not delivered; and now held by the Department of Labor and Industries of the State of Washington, and also the total number of warrants and the amount thereof that should have been issued to certain alien enemy beneficiaries from the date when the warrants were issued up to and including the date of the declaration of peace between the United States of America and the Imperial German Government and the Imperial and Royal Austro-Hungarian Government.

#### IV.

That all of said claims shown by the said schedules, in pursuance to the provisions of the "Trading with the Enemy Act" were reported to the Alien Property Custodian of the United States of America by the said defendants, and a demand in writing therefor was made of said defendants [5] by the Alien Property Custodian of the United States of America, prior to the declaration of peace between the United States and said Imperial German Government and Imperial and Royal Austro-Hungarian Government, the said Alien Property Custodian, having determined that said warrants and said sums of money due as shown by the said schedules were due to enemies, or allies of enemies of the United States of America, not holding a license from the President of the United States, that said demands were refused upon the part of the said defendants; that said warrants and said money

are now in the possession and control of the State of Washington and the other defendants above-named who hold the same as trustees for such former alien enemies and allies of alien enemies described in said schedules.

V.

That in pursuance of said "Trading with the Enemy Act" and the executive orders issued thereunder, the said Alien Property Custodian, on the 10th day of November, 1921, duly appointed one Harry G. Rowland as his representative in the State of Washington; that the said plaintiff is entitled to the delivery of the warrants described in said schedules, and to the payment to him of the amounts due to the said former alien enemies of the United States described therein.

WHEREFORE the plaintiff prays that an order be issued directed to the United States Marshal of the above-named Court directing him to seize the warrants above described; that an order be issued citing the above-named defendants to appear at the time and place to be appointed by this Court [6] to show cause why they should not deliver forthwith to the above-named plaintiff the said warrants and pay over to him the various amounts shown in the said schedules hereto attached; that upon the return of such order to show cause that all of the warrants and moneys described herein be paid over

to plaintiff; that plaintiff receive his costs and disbursements of and from the defendants.

THOMAS W. MILLER,  
Alien Property Custodian of the United States of  
America.

By HARRY G. ROWLAND,  
Representative and Attorney.  
Office and P. O. Address:  
410 Equitable Bldg.,  
Tacoma, Washington.

State of Washington,  
County of Pierce,—ss.

Harry G. Rowland, being first duly sworn, on oath deposes and says: That he is the duly appointed, qualified and acting representative of Thomas W. Miller, Alien Property Custodian of the United States of America, and the plaintiff above-named; that he has read the foregoing complaint, knows its contents and believes the same to be true; that he makes this affidavit for and in behalf of the plaintiff.

HARRY G. ROWLAND.

Subscribed and sworn to before me this 19th day of July, 1922.

[Notary Seal]                      DIX H. ROWLAND,  
Notary Public in and for the State of Washington,  
Residing at Tacoma. [7]

### SCHEDULE "A."

Statement of Warrants and Sums of Money Due,  
Under the Workingmen's Compensation Law of  
the State of Washington, to Subject of the

Imperial German Government, a Former Alien Enemy of the United States of America, Which Have Been Reported to the Alien Property Custodian of the United States of America, and Demanded by Him.

Workman's Name: Philip Weimer.

Claim No. 1616.

Date of Death: November 21, 1911.

Employer: Greenway & Leach, Yakima, Wash.

Claimants or Beneficiaries: Samuel Weimer (father).

Address: Nene Strasse 16, Sippersfeld, Rockenhansen, Pfalz, Germany.

Warrants drawn but not delivered: From October 17, 1914 to and including April 15, 1918. 43 warrants at \$2.50 each.

Payments accrued but no warrants drawn:

From April 15, 1918, to November 17, 1921:

43 warrants @ \$2.50 each.....	\$107.50
1 warrant @ .35 .....	.35

---

\$107.85

[8]

### SCHEDULE "B."

Statement of Warrants and Sums of Money Due, Under the Workingmen's Compensation Law of the State of Washington, to Subjects of the Imperial and Royal Austro-Hungarian Government, Former Alien Enemies of the United



States of America, Which Have Been Reported  
to the Alien Property Custodian of the United  
States of America, and Demanded by Him.

## #1.

Workman's Name: Bosko Popovich.

Claim No. 314.

Date of Death: October 21, 1911.

Employer: Stone & Webster Eng. Co.,  
Inc., Bellingham, Wash.

Claimants or Beneficiaries: Stanica  
Popovich.

Address: Vehovine Cratia, Hungary.

Warrants drawn but not delivered:

#108246	10-17-16	\$10.15
127823	4-16-17	10.15
145208	10-10-17	10.15
161848	4-15-18	10.15

Payments accrued but no warrants  
drawn:

From April 15, 1918, to November 17,  
1921:

43 Warrants @ \$10.15 ea....	\$436.45
1 Warrant @ .68 . . . . .	.68

---

437.13      \$437.13

## #2.

Workman's name: Pajo Zakula.

Claim No. 44324.

Date of death: October 19, 1914.

Employer: Lehigh Portland Cement Co.,  
Metaline Falls, Washington.

Claimants or Beneficiaries: Mika Zakula.

Address: House 188, Viprla, Community of Kornica, Province of Croatia.

Warrants drawn but not delivered: For September 15, 1916, to and including May 15, 1918, or 21 warrants at \$35 each.

Payments accrued but no warrants drawn:

From May 15, 1918 to November 17, 1921:

42 warrants @ \$35 each ....\$1470.00

1 warrant @ 2.33 .... 2.33

---

1472.33      1472.33

#3.

Workman's Name: Martin Kosich.

Claim No. 48343.

Date of death: February 26, 1915.

Employer: Schafer Bros. Logging Co., Satsop, Wash.

Claimants or Beneficiaries: Josefa Kosich.

Address: Racice 49, Castelnuo, Istria, Austria.

Warrants drawn but not delivered: Warrants from February 14, 1917, to and inclusive of May 15, 1918. Sixteen warrants at \$25 each.

Warrant to *w*.

Payments accrued but no warrants drawn:

From May 15, 1918, to November 17,  
1921:

42 warrants @ \$25 each ....\$1050.00

1 warrant @ 1.66 .... 1.66

---

1051.66

Amt. forwarded ..... 2961.12

[9]

Amt. brought forward.....\$ 2961.12

#4.

Workman's Name: Mate Ovcarcic.

Claim No. 36034.

Date of Death: April 8, 1914.

Employer: Coates Fordney Logging Co.,  
Aberdeen, Wash.

Claimants or beneficiaries: Maria Ovcarcic.

Address: Male Maune, #33, Community  
of Podrad, Istria, Austria.

Warrants drawn but not delivered: Warrants for September 15, 1916, to May 15, 1918, Inc. 21 warrants at \$35.00 each.

Payments accrued but no warrants drawn:

From May 15, 1918, to November 17,  
1921:

42 warrants @ 35.00 each ..\$1470.00

1 warrant @ 2.33 ... 2.33

---

\$1472.33 1472.33

#5.

Workman's Name: Stanisa Zakula.

Claim No. 36776.

Date of Death: April 23, 1914.

Employer: Lehigh Portland Cement Co.,  
Metaline Falls, Washington.

Claimants or Beneficiaries: Bude Zakula  
(for self and Seba), Dependent father  
and mother.

Address: Trena, House 45, Nova Grad-  
ska, Croatia, Hungary.

Warrants drawn but not delivered: War-  
rants payable to Bude Zakula, Septem-  
ber 15, 1916, to September 15, 1917.  
13 warrants at \$20 each.

Payments accrued but no warrants  
drawn:

From September 15, 1917, to November  
17, 1921:

50 Warrants at \$20 each.....1000.

1 Warrant at 1.33.....1.33

---

1001.33    \$1001.33

#6.

Workman's Name: John (Ivan) Bozich.

Claim No. 37307.

Date of death: May 9, 1914.

Employer: Columbia Contract Co., Fisher,  
R. F. D. #2, Camas, Washington.

Claimants or Beneficiaries: Katherine  
Bozich and John (son).

Address: House #18, Brest, Pinguente,  
Istria, Austria.



Warrants drawn but not delivered: October 17, 1916 to and inclusive May 15, 1918, 21 warrants at \$25 ea.

Payments accrued but no warrants drawn:

From May 15, 1918, to November 17, 1921:

13 warrants @ \$25 each	.....	\$430.00
1 warrant @ 5.00	.....	5.00
24 warrants @ 20.00	.....	480.00
4 warrants @ 20.00	.....	80.00
1 warrant @ 17.32	.....	17.32

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	1012.32	1012.32
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Amt. forwarded	.....\$	6447.10
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[10]

Amt. brought forward	.....	6447.10
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#7.

Workman's Name: Vajo Zigich.

Claim No. 37308.

Date of death: May 9, 1914.

Employer: Columbia Contract Co., R. F.

D. #2, Camas, Washington.

Claimants or Beneficiaries: Kate Zigic (mother).

Address: House #43, Dugidol, Vrhovine, Otocac, Croatia, Hungary.

Warrants drawn but not delivered: September 15, 1916, to and inclusive of April 15, 1918, 20 warrants at \$5.80 each.

Payments accrued but no warrants  
drawn:

From April 15, 1918 to November 17,  
1921:

43 warrants	at \$5.80 each....	251.40
1 warrant	.39.....	.39

---

251.79

251.79

#8.

Workman's Name: John Nikolac.

Claim No. 38046.

Date of Death: May 26, 1914.

Employer: General Package Mfg. Co.,  
Aberdeen, Wash.

Claimants or Beneficiaries: Mara Niko-  
lac (widow) and Jure, Matija, Nikola,  
Nedilkja and Milica, (children).

Address: Plina, PO. Kormin, Dalmacia,  
Austria.

Warrants drawn but not delivered: From  
May 17, 1915, to and inclusive of May  
15, 1918, 37 warrants at \$35 each.

Payments accrued but no warrants  
drawn:

From May 15, 1918, to November 17,  
1921:

42 warrants @	35.00 each ..	\$1470.00
1 warrant @	2.33	... 2.33

---

1472.33

1472.33

## #9.

Workman's Name: Tony (erch) Erceg.

Claim No. 39852.

Date of death: June 30, 1914.

Employer: Easter & Western Lbr. Co.,  
Kelso, Wash.

Claimants or Beneficiaries: Jozé Erceg  
(father).

Address: Podbabje, Imotski, Dalmatia,  
Austria.

Warrants drawn but not delivered: From  
September 15, 1916, to and including  
April 15, 1918. 20 warrants at \$7.55  
each.

Payments accrued but no warrants  
drawn:

From April 15, 1918, to November 17,  
1921:

43 warrants @ \$7.55 each ...\$324.65

1 warrant @ .51 .... .51

---

325.16

325.16

## #10.

Workman's Name: Antone Garamanich.

Claim No. 40459.

Date of death: September 30, 1914.

Employer: Booth Fisheries Co., Ana-  
cortes, Wash.

Claimants or Beneficiaries: Katrina Car-  
aminich (mother).

Address: 299 St. Nicholas St. Lussin-  
grande, Capitanat of Lussingiccola,  
Istria, Austria.

---

Amt. forwarded .....\$ 8496.38

[11]

Amt. brought forward .... \$ 8,496.38

Warrants drawn but not delivered:

From September 15, 1916, to and in-  
cluding April 15, 1918, 20 warrants  
at \$8.35 each.

Payments accrued but no warrants  
drawn: From April 15, 1918, to No-  
vember 17, 1921:

43 Warrants at \$8.35 each \$359.05

1 Warrant at .56 .56

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359.61 359.61

#11.

Workman's Name: John Setka.

Claim No. 42228.

Date of Death: August 31, 1914.

Employer: Manley Moore Lbr. Co.,  
Tacoma, Wash.

Claimants or Beneficiaries: Nikola  
Setka and Matija Setka (father and  
mother).

Address: Desne, Jomin, Opuzen, Dalma-  
cia, Austria.

Warrants drawn but not delivered:

From September 15, 1916, to and in-  
cluding March 14, 1918. 20 warrants  
at \$5.20 each.



Payments accrued but no warrants  
drawn: From March 14, 1918, to No-  
vember 17, 1921:

44 warrants @ \$5.20 each	\$228.80	
1 warrant @ .52	.52	

---

\$229.32

229.32

#12.

Workman's Name: Valmer Strelec.

Claim No. 52020.

Date of death: June 7, 1915.

Employer: Carbon Coal & Clay Co.,  
Bayne, Wash.

Claimants or Beneficiaries: Rosalija  
Strelec (widow).

Address: 171 Novi Varos, Mrkopalj,  
Croatia, Austria-Hungary.

Warrants drawn but not delivered:  
From December 17, 1915, to and in-  
cluding May 15, 1918, 32 warrants at  
\$35 each.

Payments accrued but no warrants  
drawn: From May 15, 1918, to No-  
vember 17, 1921:

42 warrants @ \$35.00 each	\$1470.00	
1 warrant @ 2.33	2.33	

---

1472.33

1,472.33

#13.

Workman's Name: Joseph Majkut.

Claim No. 5312.

Date of Death: April 15, 1912.

Employer: Pacific Coast Coal Co., Burnett, Wash.

Claimants or Beneficiaries: Meri Majkut.

Address: Henzlofalva, Gomor Megye, U. P. Mereny, Hungary.

Warrants drawn but not delivered:  
From September 15, 1916, to and including May 15, 1918. 21 warrants at \$18.75 each.

Payments accrued but no warrants drawn: From May 15, 1918, to November 17, 1921:

42 warrants at \$18.75	.....	787.50
1 warrant at 1.25	.....	1.25

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788.75	788.75
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Amt. forward	.....	\$11,346.39
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[12]

Amt. brought forward	....	\$11,346.39
#14.		

Workman's Name: Anton Kresevic.

Claim No. 10610.

Date of death: August 29, 1912.

Employer: Northern Coast Tbr. Co.,  
Near Graham, Wash.

Claimants or Beneficiaries: Martin Kresevic and Marie Kresevic (mother and father).

Address: House 16, Racice, Dist. of Castelnuovo, Istria, Austria.

Warrants drawn but not delivered:

From April 16, 1917, to and including April 15, 1918. 13 warrants at \$5.75 each.

Payments accrued but no warrants drawn: April 15, 1918, to November 17, 1921:

43 warrants at \$5.75 each \$247.25

1 warrant at .39 .39

---

\$247.64 247.64

#15.

Workman's Name: L. Vodopovich.

Claim No. 11509.

Date of Death: September 21, 1912.

Employer: Grant Smith & Co., Sherlock, Wash.

Claimants or Beneficiaries: Maria Vodopovich (mother).

Address: Tmotica Ston, Dalmatia, Austria.

Warrants drawn but not delivered:

From September 15, 1916, to and including April 15, 1918. 20 warrants at \$5.00 each.

Payments accrued but no warrants drawn: April 15, 1918, to November 17, 1921:

43 warrants at \$5.00 each .. 215.00

1 warrant at .33 .. .33

---

215.33 215.33

#16.

Workman's Name: Mike Bratovich.

Claim No. 13232.

Date of death: October 27, 1912.

Employer: Northern Coast Tbr. Co.,  
Near Graham, Wash.

Claimants or Beneficiaries: Anna Bratovich (widow).

Address: #8 Calle del Babacane, Fiume,  
Hungary.

Warrants drawn but not delivered:

From September 15, 1916, to and including March 15, 1917. 7 warrants at \$30.00 each. From April 16, 1917, one warrant, \$26.83. From May 15, 1917, to and including May 15, 1918, 13 warrants at \$25 each.

Payments accrued but no warrants drawn: May 15, 1918, to November 17, 1921:

12 warrants @	\$25.00 each	300.00
1 warrant @	.83	.83
30 warrants @	20.00	600.00
1 warrant @	1.33	1.33

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\$902.16	902.16
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Amt. forwarded .....	\$12,711.52
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[13]

Amt. brought forward ....	\$12,711.52
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## #17.

Workman's Name: Mate Vagar.

Claim No. 13708.

Date of Death: November 11, 1912.

Employer: Columbia Contract Co., Near  
Fisher, Wash.

Claimants or Beneficiaries: Ivan and  
Matijo Vagar (father and mother).

Address: Prapatnice, Dist. of Vrgorac,  
Dalmatia, Austria.

Warrants drawn but not delivered:  
From October 17, 1916, to and includ-  
ing May 15, 1918. 20 warrants at \$10  
each.

Payments accrued but no warrants  
drawn: From May 15, 1918, to Novem-  
ber 17, 1921:

42 warrants at \$10.00 each \$420.00

1 warrant at .66 .66

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420.66

420.66

## #18.

Workman's Name: Sava Ivanovich.

Claim No. 14529.

Date of death: December 2, 1912.

Employer: Superior Portland Cement  
Co., Concrete, Wash.

Claimants or Beneficiaries: Joke Ivano-  
vich (widow) and three children.

Address: K. Maini, Budva, Dalmatia,  
Austria.

Warrants drawn but not delivered:  
 From June 15, 1915, to and including,  
 July 15, 1917, at \$35. 37 warrants at  
 \$35 each. One August 15, 1917, for  
 \$34.50. September 15, 1917, to and  
 including May 15, 1918, at \$30. 9 at  
 \$30 each.

Payments accrued but no warrants  
 drawn:

37 warrants @	\$30 each	..	\$1110.00
1 warrant @	20	..	20.00
4 warrants @	25	..	100.00
1 warrant @	10	..	10.00

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1240.00	1,240.00
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#19.

Workman's Name: John Fizulich.

Claim No. 17695.

Date of death: February 23, 1913.

Employer: Northwestern Lbr. Co., Ho-  
 quiam, Wash.

Claimants or Beneficiaries: Nick and  
 Maria Fizulich (father and mother).

Address: Dragove P. O. Bozava, Dalma-  
 tia, Austria.

Warrants drawn but not delivered:  
 From November 15, 1916, to and in-  
 cluding May 15, 1918. 21 warrants at  
 \$12.10 each.

Payments accrued but no warrants  
 drawn:

42 warrants @ \$12.10 each \$508.20

1 warrant @ .81 .81

---

509.01

509.01

#20.

Workman's Name: Vaso Dragicevich.

Claim No. 19001.

Date of death: March 19, 1913.

Employer: Hammond Lbr. Co., Camp 3,  
Oak Pt., Wash.Claimants or Beneficiaries: Marija  
Dragicevich (widow).

Address: Obrovazzo, Dalmatia, Austria.

Amt. forwarded ..... \$14,881.19

[14]

Amt. brought forward ..... \$14,881.19

Warrants drawn but not delivered:

From December 15, 1916, to and in-  
cluding May 15, 1918, 16 warrants at  
\$25 each.Payments accrued but no warrants  
drawn: From May 5, 1918, to Novem-  
ber 17, 1921:

29 warrants @ \$25.00 each \$725.00

1 warrant @ 11.16 11.66

12 warrants @ 20.00 240.00

1 warrant @ 12.00 12.00

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988.66

988.66

#21.

Workman's Name: Joe Smirka.

Claim No. 19069.

Date of death: March 25, 1913.

Employer: Pennsylvania Coal Co., Tacoma, Wash.

Claimants or Beneficiaries: Marija Smrke.

Address: Gorenji Globodol, P. O. Mirnapec-Koenigstein, Krain, Austria.

Note: Re-marriage occurred Feb. 4, 1917, to Nikolus Tomazik, address after marriage changed to: Goringi, Globobol 30 O.O. Pri. Mirno, Peci, Dolenjsko, Jugo Slavia.

Warrants drawn but not delivered:  
From August 13, 1914, to and including February 4, 1917:

29 warrants at \$20.00 each 580.00

1 warrant at \$13.99..... 13.99

Marriage settlement .... 240.00

---

#22.

Workman's Name: Mike Susnjar.

Claim No. 20588.

Date of death: April 24, 1913.

Employer: Eastern & Western Lbr. Co., Eufaula, Wash.

Claimants or Beneficiaries: Filip and Iva Susnjar (father and mother).

Address: Pedbablje, Dist. Imotski, Dalmatia, Austria.

Warrants drawn but not delivered:

From August 13, 1914, to and including April 15, 1921. 45 warrants at \$6.00 each.

Payments accrued but no warrants drawn: From April 15, 1918, to November 17, 1921:

43 warrants at \$6.00 each	258.00
1 warrant at .40	.40
	<hr/>
	258.40

#23.

Workman's Name: Geo. Polic.

Claim No. 21652.

Date of death: May 21, 1913.

Employer: East Creek Coal Co., Ladd, Wash.

Claimants or Beneficiaries: Jovana Polich, widow.

Address: Hreljina, House #224 Dist. of Bakar, Croatia, Hungary.

Amt. forwarded . . . . . \$16,128.25

[15]

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Amt. brought forward . . . . . \$16,128.25

Warrants drawn but not delivered:

From September 15, 1916, to and including May 15, 1918. 21 warrants at \$20 each.



Payments accrued but no warrants drawn: From May 15, 1918, to November 17, 1921:

42 warrants @ \$20.00	....	\$840.00
1 warrant @ 1.33	....	1.33

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	841.33	841.33
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#24.

Workman's Name: Pete Syrino.

Claim No. 23521.

Date of death: June 26, 1913.

Employer: Superior Portland Cement Co., Concrete, Wash.

Claimants or Beneficiaries: Anton Syrina.

Address: Brde #19, Jelsane, Istria, Austria.

Warrants drawn but not delivered: From September 15, 1916, to and including April 15, 1918. 20 warrants at \$8.55.

Payments accrued but no warrants drawn: From April 15, 1918, to November 17, 1921:

43 warrants @ \$8.55	.....	\$367.65
1 warrant @ .57	.....	.57

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	368.22	368.22
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#25.

Workman's Name: Andrew Gregorich.

Claim No. 27518.

Date of death: September 14, 1913.

Employer: Lindstrom Handford Lbr.  
Co., Rainier, Wash.

Claimants or Beneficiaries: Andro and  
Katarina Grguric.

Address: Lokvica, Croatia, Hungary.

Warrants drawn but not delivered:  
From September 15, 1916, to March 4,  
1917, Semi Annual Payments. Four  
warrants at \$11.48 each. One warrant  
April 14, 1917, for \$1.91.

Payments accrued but no warrants  
drawn: From April 14, 1917, to No-  
vember 17, 1921:

1 warrant April 14, 1917,		
	@ \$9.57.....	9.57
8 warrants @ 11.48.....		91.84
1 warrant @ .53.....		.53
		<hr/>
		\$101.94

101.94

#26.

Workman's Name: Lazo Loncar.

Claim No. 27862.

Date of death: September 17, 1913.

Employer: Guthrie McDougal Co., Ta-  
coma, Wash.

Claimants or Beneficiaries: Sara Lon-  
car, widow.

Address: House #210, Mutilici, Dist. of  
Udbina, Croatia, Hungary.

Warrants drawn but not delivered:  
From September 15, 1916, to May 15,  
1918. 21 warrants \$20 each.

Payments accrued but no warrants  
drawn: From May 15, 1918, to Novem-  
ber 17, 1921:

42 warrants	at \$20.00 each	\$840.00
1 warrant	at 1.33	1.33

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841.33	841.33
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Amt. forwarded	.....	\$18,281.07
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[16]

Amt. brought forward	.....	\$18,281.07
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#27.

Workman's Name: Joe Mohovich.

Claim No. 30065.

Date of Death: November 6, 1913.

Employer: Pennsylvania Coal Co., Di-  
vide, Wash.

Claimants or Beneficiaries: Anton &  
Maria Mohovic (father and mother).

Address: Zvoneca, House 116, P. O.  
Brezca, Castua-Kastav, Austria.

Warrants drawn but not delivered:  
From April 16, 1917, to and including  
May 15, 1918. 14 warrants at \$10.65  
each.

Payments accrued but no warrants  
drawn: From May 15, 1918, to No-  
vember 17, 1921:

42 warrants	@ 10.65	.....	447.30
1 warrant	@ .71	.....	.71

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448.01	448.01
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## #28.

Workman's Name: Tony Dragicevich.

Claim No. 33304.

Date of death: February 3, 1914.

Employer: Washington Portland Cement Co., Concrete, Wash.

Claimants or Beneficiaries: Mary Dragicevich (widow and children).

Address: Zoastro, Dalacia, Austria.

Warrants drawn but not delivered:

From February 14, 1917, to and including May 15, 1918. 18 warrants at \$35 each.

Payments accrued but no warrants drawn: From May 15, 1918, to November 17, 1921:

6 warrants	@ 35.00 each	210.00
1 warrant	@ 31.50	31.50
35 warrants	@ 25.00	875.00
1 warrant	@ 4.11	4.11

---

1120.61      1,120.61

## #29.

Workman's Name: John (Bulien) Gulja.

Claim No. 49106.

Date of death: March 24, 1915.

Employer: Lytle Logging & Merc. Co.,  
Hoquiam, Wash.

Claimants or Beneficiaries: Lovrenz and  
Palonia Gulja.

Address: #41 Brdo near Jelsane, Vol-  
osca County, Austria.

Warrants drawn but not delivered:

From February 14, 1917, to and including February 15, 1918. 3 warrants \$10.50 each paid semi-annually. One April 15, 1918, for \$3.50.

Payments accrued but no warrants drawn. From April 15, 1918, to November 17, 1921:

1	warrant	@ \$ 7.00	.....	7.00
7	warrants	@ 10.50	.....	80.50
1	warrant	@ .90	.....	.90

---

88.40                      88.40

Amt. forwarded .... \$19,938.09

[17]

Amt. brought forward .... \$19,938.09

#30.

Workman's Name: Peter Smiljanic.

Claim No. 49349.

Date of death: March 31, 1915.

Employer: Pacific Coast Coal Co., Burnett, Wash.

Claimants or Beneficiaries: Vasilija Smiljanic (mother).

Address: No. 32 Prokike, Croatia.

Warrants drawn but not delivered:

From September 15, 1916, to and including April 15, 1918. 20 warrants at \$7.25 each.

Payee died March 26, 1920.



Payments accrued but no warrants  
drawn: From April 15, 1918, to March  
26, 1920:

23 warrants @ \$7.25 each \$166.75

1 warrant @ 2.66 2.66

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169.41

169.41

#31.

Workman's Name: Rade Lukich.

Claim No. 31067.

Date of Death: November 30, 1913.

Employer: Guthrie McDougall Co., Les-  
ter, Wash.

Claimants or Beneficiaries: Marta Lu-  
kic (mother).

Address: Trnovoc, House #64, Koren-  
ica, Croatia, Hungary.

Warrants drawn but not delivered:  
From October 17, 1916, to and includ-  
ing May 15, 1918. 21 warrants at \$10  
each.

Payments accrued but no warrants  
drawn: From May 15, 1918, to Novem-  
ber 17, 1921:

42 warrants @ 10.00 each \$420.00

1 warrant @ .67 .67

---

420.67

420.67

#32.

Workman's Name: Andrew Majetich.

Claim No. 54155.

Date of death: July 29, 1915.

Employer: Northwestern Imp. Co., Roslyn, Wash.

Claimants or Beneficiaries: Marija Matjetic, widow.

Address: No. 4/13 Maledrage, community of Brod Moravice, Croatia.

Warrants drawn but not delivered:  
From April 15, 1917, to May 15, 1918, inclusive. 14 warrants at \$25 each.

Payments accrued but no warrants drawn: From May 15, 1918, to November 17, 1921:

19	warrants	@	\$25.00	each	475.00	
1	warrant	@	14.16		14.16	
22	warrants	@	20.00		440.00	
1	warrant	@	10.00		10.00	939.16

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#33.

Workman's Name: Stanko Dejanovic.

Claim No. 1503.

Date of death: December 6, 1911.

Employer: George Chew, Starbuck, Wash.

Claimants or beneficiaries: Mika Dejanovich, widow.

Address: Stabandja, Dist. of Bosnisch Krupa, Bosnia, Austria-Hungary.

Warrants drawn but not delivered:  
From Sept. 15, 1916, to May 15, 1918, inc. 21 warrants at \$25 each.

Payments accrued but no warrants drawn: From May 15, 1918, to November 17, 1921:

42 warrants @ \$25.00 each	1050.00		
1 warrant @ 1.67	1.67	1,051.67	
		<hr/>	<hr/>
Total .....		22,519.00	

[18]

### SCHEDULE "C."

Statement of Warrants and Sums of Money Due, Under the Workingmen's Compensation Law of the State of Washington, to Subject of the Kingdom of Bulgaria, a Former Alien Enemy of the United States of America, which have been Reported to the Alien Property Custodian of the United States of America, and Demanded by Him.

Workman's Name: Yahn Yakimoff.

Claim No. 44993.

Date of death: November 8, 1914.

Employer: Hamond Lbr. Co., Oak Point, Wash.

Claimants or Beneficiaries: Spassa Ivanova Yakimoff.

Address: Glavonvsti, Verkovo, Bulgaria.

Warrants drawn but not delivered: May 17, 1915, to May 15, 1918. One warrant dated May 17, 1915, for \$30, and warrants for June 15, 1916, to and including May 15, 1918, at \$30 each. 25 warrants at \$30 each.

Payments accrued but no warrants drawn: From  
May 15, 1918, to November 17, 1921:

19 warrants @ \$30.00	570.00
1 warrant @ 25.00	25.00
22 warrants @ 25.00	550.00
1 warrant @ 5.83	5.83
<hr/>	
	\$1150.83

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [19]

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In the District Court of the United States for the  
Western District of Washington, Southern  
Division.

No. 155-E.

THOMAS W. MILLER, Alien Property Custodian  
of the United States of America,  
Plaintiff,

vs.

EDWARD CLIFFORD, Superintendent of the  
Department of Labor and Industries of the  
State of Washington, and E. S. GILL, Super-  
visor of Industrial Insurance of the Depart-  
ment of Labor and Industries of the State of  
Washington,

Defendants.

**Amended Bill of Complaint.**

To the Honorable Judges of the Above-entitled Court:

Comes now the plaintiff above named and with leave of court first had and obtained, amends his bill of complaint against the above-named defendants, and alleges as follows:

**I.**

That the above-named plaintiff is the duly appointed qualified and acting Alien Property Custodian of the United States of America, appointed by the President of the United States under and by virtue of an act of Congress of the United States of America, known as the "Trading with the Enemy Act" passed on the 6th day of October, 1917, and the acts of Congress amendatory and supplementary thereto, possessing all the powers granted by said acts of Congress and the executive orders issued in pursuance thereof.

**II.**

That the defendant, Edward Clifford, is the duly appointed, qualified and acting Superintendent of Labor and [20] Industries of the State of Washington, and the defendant, E. S. Gill is the duly appointed, qualified and acting Supervisor of Industrial Insurance, and under said Superintendent of Labor and Industries of the State of Washington; that the said Department of Labor and Industries of the State of Washington has charge of the administration of the "Workingmen's Compensation Law" so called of the State of Washington; that it is the duty of said Edward Clifford and E. S. Gill, as such officers of said De-



partment of Labor and Industries of the State of Washington, to pass upon all claims arising under said Workingmen's Compensation Law, and direct the payment thereof out of the funds of the State of Washington collected and set aside for that purpose, to the parties entitled thereto.

That the said Edward Clifford, as Superintendent of Labor and Industries, and the said E. S. Gill, as Supervisor of Industrial Insurance, have the power, and it is their duty through and by means of the Division of Industrial Insurance of the Department of Labor and Industries of the State of Washington, to exercise all the power and perform all the duties formerly vested in and required to be performed by the former Industrial Insurance Department of the State of Washington, and the former commissioners thereof; that all of said defendants are residents of the Judicial District above named.

### III.

That on the 6th day of April 1917, by a joint resolution of Congress, a state of war was declared to exist between the United States and the Imperial German Government, and on [21] the 7th day of December, 1917, by a joint resolution of Congress, a state of war was declared to exist between the United States of America and the Imperial and Royal Austro-Hungarian Government; that the Kingdom of Bulgaria was an ally of Austria-Hungary and Germany in said war, and as such became subject to the provisions of said "Trading with the Enemy Act"; that between the time when

the United States declared war against the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, as herein set forth, and the date of the passage of the resolution of Congress terminating such wars, reserving therein to the United States and the Alien Property Custodian all the rights held theretofore under the said "Trading with the Enemy Act," sundry persons, being subjects of the Imperial German Government, the Imperial and Royal Austro-Hungarian Government and the Kingdom of Bulgaria, an ally of said two last-mentioned governments, dependants of deceased workmen formerly domiciled within the State of Washington, all of which dependants residing in the several nations of which they were subjects, were entitled, under the provisions of said Workingmen's Compensation Law, to certain moneys in the fund set aside by the State of Washington, for that purpose, the claims of said dependants upon said fund having been duly approved and allowed by the above-named officers or their predecessors, in due course; that in many cases warrants for the payment of such funds were actually issued in the name of the beneficiaries but not delivered to them, but held by the said officers of said Department of Labor and Industries of the State of Washington, and in all other cases where the warrants were not issued, the claims were [22] duly approved and allowed, and said beneficiaries became entitled to the issuance of warrants for the payment of the said several sums; that attached to the original bill of com-

plaint are three schedules, respectively entitled, Schedule "A," Schedule "B" and Schedule "C," which said schedules are made a part of this complaint the same as if hereto attached.

That Schedule "A" contains a statement of all claims due to subjects of the Imperial German Government arising under the Workingmen's Compensation Law of the State of Washington; that Schedule "B" contains a statement of all claims due to subjects of the Imperial and Royal Austro-Hungarian Government arising under the Workingmen's Compensation Law of the State of Washington; that Schedule "C" contains a statement of all claims due to subjects of the Kingdom of Bulgaria arising under the Workingmen's Compensation Law of the State of Washington; that said several schedules show severally the name of the deceased, the name and residence of the beneficiaries, the date of death, the total amount of warrants issued and not delivered, and now held by the Department of Labor and Industries of the State of Washington, and also the total number of warrants and the amount thereof that should have been issued to certain alien enemy beneficiaries from the date when the warrants were issued up to and including the date of the declaration of peace between the United States of America and the Imperial German Government and the Imperial and Royal Austro-Hungarian Government.

#### IV.

That all of said claims shown by the said schedules in pursuance to the provisions of the "Trading with

the Enemy Act'' were reported to the Alien Property Custodian [23] of the United States of America by the said defendants, or their predecessors, and a demand in writing therefor was made of said defendants by the Alien Property Custodian of the United States of America, prior to the declaration of peace between the United States and said Imperial German Government and Imperial and Royal Austro-Hungarian Government, the said Alien Property Custodian, having after investigation determined that said warrants and said sums of money due as shown by the said schedules were due to enemies, or allies of enemies of the United States of America, not holding a license from the President of the United States; that said demands were refused upon the part of the said defendants; that said warrants are now in the possession and control of the said defendants, and the funds described in said schedules, for which no warrants have been issued, are deposited with the State Treasurer of the State of Washington, subject to be paid out upon warrants issued by the State Auditor of the State of Washington, upon vouchers furnished by the defendants; that the State Auditor is willing to issue the warrants and the State Treasurer to pay the same if the said defendants will issue vouchers therefor, but that the said defendants wrongfully and unlawfully refuse to issue to the plaintiff such vouchers, and it is solely on account of the arbitrary and unlawful action of the said defendants that the said amounts are not paid to the plaintiff; that the said defendants



hold said funds as trustees for such former alien enemies and allies of alien enemies described in said schedules.

## V.

That in pursuance of said Trading with the Enemy Act [24] and the executive orders issued thereunder, the said Alien Property Custodian, on the 10th day of November, 1921, duly appointed one Harry G. Rowland as his representative in the State of Washington; that the said plaintiff is entitled to the delivery of the warrants described in said schedules, and to the payment to him of the amounts due to the said former alien enemies of the United States described therein.

## VI.

That the plaintiff has no plain, speedy or adequate remedy in the ordinary course of law.

WHEREFORE the plaintiff prays that an order be issued directed to the United States Marshal of the above-named court directing him to seize the warrants above described; that an order be issued citing the above-named defendants to appear at the time and place to be appointed by this Court to show cause why they should not deliver forthwith to the above-named plaintiff the said warrants, and should not issue to him vouchers for the various amounts shown in the said schedules attached to the original bill of complaint, that upon the return of such order to show cause that all of the warrants and money described herein may be paid over to plaintiff; that plaintiff receive his costs and disbursements of and from the defendants, and such



other and further relief as to the court may seem equitable.

THOMAS W. MILLER,  
Alien Property Custodian of the United States of  
America.

By HARRY G. ROWLAND,  
Representative.

Office and P. O. Address;  
410 Equitable Bldg.,  
Tacoma, Washington. [25]

State of Washington,  
County of Pierce,—ss.

Harry G. Rowland, being first duly sworn, on oath deposes and says: That he is the duly appointed, qualified and acting representative of Thomas W. Miller, Alien Property Custodian of the United States of America, and the plaintiff above named; that he has read the foregoing complaint, knows its contents and believes the same to be true; that he makes this affidavit for and in behalf of the plaintiff.

HARRY G. ROWLAND.

Subscribed and sworn to before me this 28th day of August, 1922.

[Seal of Notary] EDWARD M. SHERWOOD,  
Notary Public in and for the State of Washington,  
Residing at Tacoma.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 28, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [26]

In the District Court of the United States, for the  
Western District of Washington, Southern  
Division.

No. 155—E.

THOMAS W. MILLER, Alien Property Custodian of the United States of America,  
Plaintiff,

vs.

EDWARD CLIFFORD, Superintendent of the  
Department of Labor & Industries of the  
State of Washington, and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor & Industries of the State of  
Washington,

Defendants.

**Motion to Dismiss.**

Come now the defendants and move to dismiss the amended bill of complaint filed herein for the reasons and upon the grounds that, as appears upon the face thereof.

I.

This Court has no jurisdiction over the persons of the defendants, or either of them, or of the subject matter of this action.

II.

That the complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendants pray that the above-

entitled action be dismissed, and that they recover their costs and disbursements herein.

L. L. THOMPSON,  
Attorney General,  
JOHN H. DUNBAR,  
Assistant Attorney General,  
Attorneys for Defendants

Received copy of the above motion on Sept. 8, 1922.

H. G. ROWLAND,  
Atty. for and Representative of Plaintiff. [27]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Sept. 12, 1922. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy [28]

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In the District Court of the United States, for the  
Western District of Washington, Southern  
Division.

No. 155—E.

THOMAS W. MILLER, Alien Property Custodian of the United States of America,  
Plaintiff,

vs.

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington, and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,

Defendants.

**Order Denying Motion to Dismiss Amended Bill  
of Complaint.**

This cause comming on to be heard on the 9th day of October, 1922, before Hon. E. E. Cushman Judge of the above-entitled court, on the defendants' motion to dismiss the plaintiff's amended complaint, for the reason that it appears upon the face of the amended complaint that the Court has no jurisdiction over the persons of the defendants or either of them, or of the subject matter of the action, and that the amended complaint does not state facts sufficient to constitute a cause of action, the plaintiff appearing by his attorney and representative, H. G. Rowland, Esq., and the defendants appearing by Hon. John H. Dunbar, Assistant Attorney General of the State of Washington, and the court being fully advised orders,—

That said motion be and the same is hereby denied and overruled, to which ruling the defendants except and the exception is allowed.

Dated this 10th day of October, 1922.

EDWARD E. CUSHMAN,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [29]

In the District Court of the United States for the  
Western District of Washington, Southern  
Division.

No. 155—E.

THOMAS W. MILLER, Alien Property Custodian  
of the United States of America,

Plaintiff,

vs.

EDWARD CLIFFORD, Superintendent of the De-  
partment of Labor and Industries of the  
State of Washington, and E. S. GILL, Super-  
visor of Industrial Insurance of the Depart-  
ment of Labor and Industries of the State of  
Washington,

Defendants.

### **Decree and Judgment.**

This cause having come on for hearing on the 9th day of October, 1922, before Hon. Edward E. Cushman, Judge of said Court, upon the defendant's motion to dismiss the amended bill of complaint, for the reason that it appeared upon the face of the said amended bill of complaint that the Court has no jurisdiction of the persons of the defendants, or either of them, or of the subject matter of the action, and that the complaint did not state facts sufficient to constitute a cause of action against the defendants, the plaintiff appearing by H. G. Rowland, Esq., attorney for and representative of the plaintiff, and the defendants by John H. Dunbar, Assistant Attorney General of the State of Wash-



ington, attorney for the defendants, and the Court, after argument, having on the 10th day of October, 1922, duly made and entered its order denying and overruling the said motion to dismiss, and more than ten days having elapsed since the making and entering of the said order, and the said defendants not having filed [30] or served any answer or further pleading in the said case, but having elected to stand upon the said motion to dismiss and permit judgment to be entered against them in accord with plaintiff's amended complaint.

Now, therefore, by reason of the law and the premises aforesaid,

IT IS ORDERED, ADJUDGED AND DECREED that the defendants, Edward Clifford, Superintendent of the Department of Labor and Industries of the State of Washington, and E. S. Gill, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington, do forthwith deliver to the plaintiff, Thomas W. Miller, Alien Property Custodian of the United States of America, or his representative, all those certain warrants upon the State Treasury of the State of Washington, now held by defendants, and payable out of the Workingmen's Compensation Fund of the State of Washington, and also issue to said Alien Property Custodian those certain vouchers to the Auditor of the State of Washington, for certain claims owing to certain alien enemies of the United States of America, for which no warrants have been drawn, described in plaintiff's complaint, and hereinafter described, all of which were

sums due alien enemies of the United States of America, or allies of such alien enemies, at the time the United States declared war against the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or accrued after such declaration of war, and all of which were reported to the Alien Property Custodian of the United States of America, by defendants, or their predecessors, in pursuance to the "Trading with the Enemy Act," and all of which were demanded by the said Alien Property [31] Custodian after investigation and before the declaration of peace between Imperial German Government and the United States of America, the Imperial and Royal Austro-Hungarian Government and the United States of America, and the Kingdom of Bulgaria and the United States of America, a complete list of which warrants and vouchers is contained in the following schedules:

#### SCHEDULE "A."

Statement of Warrants and Sums of Money Due Under the Workingmen's Compensation Law of the State of Washington, to Subject of the Imperial German Government, a Former Alien Enemy of the United States of America, Which Have Been Reported to the Alien Property Custodian of the United States of America, and Demanded by Him.

Claim No. 1616.

Date of Death: November 21, 1911.

Claimant: Samuel Weimer (father).

Address: Nene Strasse 16, Sipperfeld  
Rockenhansen, Pfalz, Germany.

Warrants drawn but not delivered:

43 Warrants at \$2.50 each.....\$107.50

Vouchers for 44 warrants

aggregating ..... 107.66      \$215.16

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### SCHEDULE "B."

Statement of Warrants and Sums of Money Due Under the Workingmen's Compensation Law of the State of Washington, to Subjects of the Imperial and Royal-Austro Hungarian Government, Former Alien Enemies of the United States of America, Which Have Been Reported to the Alien Property Custodian of the United States of America and Demanded by Him.

#1.

Claim No. 314.

Date of Death: October 21, 1911.

Claimant: Stanica Popovich.

Address: Vehovine Cratia, Hungary.

Warrants drawn but not delivered:

#108246, #127823, #145208, #161848:

4 warrants at \$10.15 each.....\$ 40.60

Vouchers for 44 Warrants

aggregating ..... 437.13

---

Total claim..... 477.73

Forward.... \$692.89

[32]

Br. forward..... \$ 692.89

## #2.

Claim No. 44324.

Date of Death: October 19, 1914.

Claimant: Mike Zakula.

Address: House 188, Viprla Community  
of Kornica, Province of Croatia.

Warrants drawn but not delivered:

21 Warrants at \$35 each.....\$ 735.00

Vouchers for 43 warrants

aggregating ..... 1314.56

---

Total claim..... 2049.56

## #3.

Claim No. 48343.

Date of Death: February 26, 1915.

Claimant: Josefa Kosich.

Address: Racice 49, Castelnuo, Istria,  
Austria.

Warrants drawn but not delivered:

16 Warrants at \$25.00 each.. 400.00

Vouchers for 43 warrants

aggregating ..... 1051.66

---

Total claim..... 1451.66

## #4.

Claim No. 36034.

Date of Death: April 8, 1914.

Claimant: Maria Ovcarcic.

Address: Male Maune #33, Community  
of Podrad, Istria, Austria.

Warrants drawn but not delivered:

21 Warrants at \$35 each.....\$ 735.00

Vouchers for 43 warrants

aggregating ..... 1472.33

---

Total claim..... 2207.33

#5.

Claim No. 36776.

Date of Death: April 23, 1914.

Claimant: Bude Zakula (for self and  
Seba), Dependent father and mother.

Address: Trena, House 45, Nova Grad-  
ska, Croatia, Hungary.

Warrants drawn but not delivered:

13 Warrants at \$20 each..... 260.00

Vouchers for 51 warrants

aggregating ..... 1001.33

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Total claim..... 1261.33

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Amt. Forwarded.. 7662.77

[33]

Brt. forward.....\$ 7662.77

#6.

Claim No. 37307.

Date of Death: May 9, 1914.

Claimant: Katherine Bozich and John  
son).

Address: House #18, Brest Pinguenta,  
Istria, Austria.



Warrants drawn but not delivered:

21 warrants at \$25.00 each.... 525.00

Vouchers for 43 warrants

aggregating ..... 970.16

---

Total claim..... 1432.16

#7.4

Claim No. 37308.

Date of Death: May 9, 1914.

Claimant: Kata Zigic (mother).

Address: House #43, Dugidol, Vrbovine, Otocac, Croatia, Hungary.

Warrants drawn but not delivered:

20 warrants at \$5.80 each..... 116.00

Vouchers for 44 warrants

aggregating ..... 249.79

---

Total claim..... 365.79

#8.

Claim No. 38046.

Date of Death: May 26, 1914.

Claimants: Mara Nikolac (widow) and Jure, Matija, Nikola, Medilijka and Milica (children).

Address: Plina, P. O. Kormin, Dalmacia, Austria.

Warrants drawn but not delivered:

37 warrants at \$35 each..... 1295.00

Vouchers for 43 warrants

aggregating ..... 1472.33

---

Total claim..... 2767.33

..

#9.

Claim No. 39852.

Date of Death: June 30, 1914.

Claimants: Joze Erceg (father).

Address: Pobbabje, Imotski, Dalmatia,  
Austria.

Warrants drawn but not delivered:

20 Warrants at \$7.55 each..... 151.00

Vouchers for 44 warrants

aggregating ..... 325.16

---

Total claim..... 476.16

#10.

Claim No. 40459.

Date of Death: September 30, 1914.

Claimants: Katrina Caraminich  
(mother).

Address: 299 St. Nicholas St., Lussin-  
grande, Capitanat of Lussingiccola,  
Istria, Austria.

Warrants drawn but not delivered:

20 warrants at \$8.35 each..... 167.00

Vouchers for 44 warrants

aggregating ..... 359.61

---

Total claim..... 526.61

---

Amt. Forwarded.....\$13,230.82

[34]

Brt. forward..... 13,230.82

## #11

Claim No. 42228.

Date of Death: August 31, 1914.

Claimants: Nikola Setka & Matija Setka  
(father and mother).

Address: Desne, Jomin, Opuzen, Dal-  
macia, Austria.

Warrants drawn but not delivered:

20 warrants at \$5.20 each.....\$104.00

Vouchers for 44 warrants aggre-  
gating ..... 224.12

---

Total claim..... 328.12

## #12

Claim No. 52020.

Date of Death: June 7, 1915.

Claimant: Rosalija Strelec (widow).

Address: 171 Novi Varos, Markopalj,  
Croatia, Austria-Hungary.

Warrants drawn but not delivered:

32 warrants at \$35 each..... 1120.00

Vouchers for 43 warrants aggre-  
gating..... 1472.33

---

Total claim..... 2,592.33

## #13.

Claim No. 5312.

Date of Death: April 15, 1912.

Claimant: Meri Majkut.

Address: Henzlofalva, Gomor Megye,  
U. P. Mereny, Hungary.

Warrants drawn but not delivered:

21 warrants at \$18.75 each.... 393.75

Vouchers for 43 warrants aggregating..... 788.75

---

Total claim..... 11,82.50  
#14.

Claim No. 10610.

Date of Death: August 29, 1912.

Claimants: Martin Kresevic and Maria Kresevic (father and mother).

Address: House 16, Racice Dist. of Castelnovo, Istria, Austria.

Warrants drawn but not delivered:

13 warrants at \$5.75 each.....\$74.75

Vouchers for 44 warrants aggregating..... 247.64

#15.

Claim No. 11509.

Date of Death: September 21, 1912.

Claimant: Maria Vodopovich (mother).

Address: Tmotica Ston, Dalmatia, Austria.

Warrants drawn but not delivered:

20 warrants at \$5.00 each.... 100.00

Vouchers for 44 warrants aggregating ..... 215.33      315.33

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Amt. forwarded.... 17,971.49

[35]

Brt. forward.....\$17,971.49

## #16.

Claim No. 13232.

Date of Death: October 27, 1912.

Claimant: Anna Bratovich (widow).

Address: #8 Calle del Barbacane, Fiume,  
Hungary.

Warrants drawn but not delivered:

7 warrants at \$30 each.....	210.00
1 Warrant at \$26.83 each.....	26.83
13 Warrants at 25.00 each....	325.00

---

561.83

Vouchers for 44 warrants ag-  
gregating..... 901.33

---

Total claim ..... 1,463.16

## #17.

Claim No. 13708.

Date of Death: November 11, 1912.

Claimants: Ivan & Matijo Vegar (father  
and mother).

Address: Prapatnice, Dist of Vrgorac,  
Dalmatia, Austria.

Warrants drawn but not delivered:

20 Warrants at \$10 each..... 200.00

Vouchers for 43 warrants ag-  
gregating..... 420.66

---

Total claim..... 620.66



#18.

Claim No. 14529.

Date of Death: December 2, 1912.

Claimants: Joke Ivanovich (widow) and  
three children.

Address: K. Maini, Budva, Dalmatia,  
Austria.

Warrants drawn but not delivered:

37 Warrants at \$35 each..... 1295.00

1 Warrant at 34.50..... 34.50

9 Warrants at 30.00..... 270.00

---

1599.50

Vouchers for 43 warrants ag-

gregating..... 1243.16

2842.66

#19.

Claim No. 17695.

Date of Death: February 23, 1913.

Claimants: Nick and Martha Fizulich  
(father and mother).

Address: Dragove, P. O. Bozava, Dal-  
matia, Austria.

Warrants drawn but not delivered:

21 Warrants at \$12.10 each.... 254.10

Vouchers for 43 Warrants ag-

gregating..... 509.01

Total claim.....

763.11

#20.

Claim No. 19001.

Date of Death: March 19, 1913.

Claimant: Marija Dragicevich (widow).

Address: Obrovazzo, Dalmatia, Austria.

Warrants drawn but not delivered:

16 Warrants at \$25 each..... 400.00

Vouchers for 43 Warrants aggregating..... 988.45

---

Total claim.....1388.45

---

Amt. forwarded.... 25,049.53

[36]

Brt. Forward.....\$ 25,049.53

#21.

Claim No. 19069.

Date of Death: March 25, 1913.

Claimants: Marija Smrke.

Address: Gorenji Globodol, P. O.  
Mirnapec, Koengstein, Krain, Austria.

Warrants drawn but not delivered:

43 warrants at \$20 each.....\$860.00

1 warrant at 10..... 10.00

---

Total claim..... 870.00

#22.

Claim No. 20588.

Date of Death: April 24, 1913.

Claimants: Filip and Iva Sussnjar  
(father and mother).

Address: Pedbablje, Dist. of Imotski,  
Dalmatia, Austria.

Warrants drawn but not delivered:

45 warrants at \$6 each.... 270.00

Vouchers for 44 warrants aggregating..... 258.40

---

Total claim..... 528.40

#23.

Claim No. 21652.

Date of Death: May 21, 1913.

Claimant: Jovana Polich (widow).

Address: Hreljina, House #224, Dist of Baker, Croatia, Hungary.

Warrants drawn but not delivered:

21 warrants at \$20 each..... 420.00

Vouchers for 43 Warrants aggregating..... 841.33

---

Total claim..... 1261.33

#24.

Claim No. 23521.

Date of Death: June 26, 1913.

Claimant: Anton Syrina.

Address: Brdo #19 Jelsane, Istria, Austria.

Warrants drawn but not delivered:

20 warrants at \$8.55 each..... 171.00

Vouchers for 43 Warrants aggregating..... 368.22

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Total claim ..... 539.22

## #25.

Claim No. 27518.

Date of Death: September 14, 1913.

Claimants: Andro and Katarina Gruric.

Address: Lokvica, Croatia, Hungary.

Warrants drawn but not delivered:

4 warrants at \$11.48 each..... 45.92

1 warrant at 1.91..... 1.91

Vouchers for 10 warrants aggregating..... 82.34

Total claim.....	130.17
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Amt. forwarded....	28,378.65
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[37]

Brt. forward.....\$	28,378.65
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## #26.

Claim No. 27862.

Date of Death: Sepgember 17, 1913.

Claimant: Sara Loncar (widow).

Address: House #210, Mutilici, Dist. of Udbina, Croatia, Hungary.

Warrants drawn but not delivered:

21 warrants at \$20 each..... 420.00

Vouchers for 43 Warrants aggregating..... 841.33

Total claim.....	1,261.33
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## #27.

Claim No. 30065.

Date of Death: November 6, 1913.

Claimants: Anton & Maria Mohovic (father and mother).

Address: Zvoneca, House 116 P. O.  
Brezca Castua-Kastav, Austria.

Warrants drawn but not delivered:

14 warrants at \$10.65 each.... 149.10

Vouchers for 43 Warrants aggregating..... 448.01

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Total claim..... 597.11

## #28.

Claim No. 33304.

Date of Death: February 3, 1914.

Claimants: Mary Dragicevich (widow and children).

Address: Zoastro, Dalacia, Austria.

Warrants drawn but not delivered:

18 warrants at \$35 each..... 630

Vouchers for 43 Warrants aggregating..... 1121.76

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Total claim..... 1751.76

## #29.

Claim No. 49106.

Date of Death: March 24, 1915.

Claimants: Lovrenz & Palonia Gulja.

Address: #41 Brdo near Jelsane, Volosca County, Austria.



Warrants drawn but not delivered:

3 warrants at \$10.50 each..... 31.50

1 warrant at 3.50..... 3.50

Vouchers for 9 warrants aggregating..... 75.37

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Total claim..... 110.37

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..... Amt. forwarded..... 32,099.12

[38]

Brt. forward .....\$ 32,099.12

#30.

Claim No. 49349.

Date of Death: March 31, 1915.

Claimant: Vasilija Smiljanic (mother).

Address: No. 32 Prokike, Croatia.

Warrants drawn but not delivered:

20 warrants at \$7.25 each.....145.00

Vouchers for 24 warrants aggregating .....169.41

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Total claim ..... 314.41

#31.

Claim No. 31067.

Date of Death: November 30, 1913.

Claimant: Marta Lukic (mother).

Address: Tranvac, House #64, Koronica, Croatia, Austria.

Warrants drawn but not delivered:

21 Warrants at \$10 each ..... 210.00

Vouchers for 43 warrants aggregating .....420.67

Total claim ..... 630.67

#32.

Claim No. 54155.

Date of death: July 29, 1915.

Claimant: Marija Majetic (widow).

Address: No. 4/13 Meledrage, Community of Brod Moravice, Gloatia, Hungary.

Warrants drawn but not delivered:

14 warrants at \$25 each ..... 350.00

Vouchers for 43 warrants aggregating .....939.16

Total claim ..... 1289.16

#33.

Claim No. 1503.

Date of death: December 6, 1911.

Claimant: Mika Dejanovic (widow).

Address: Stabandja, Dist. of Bosnisch Krupa, Bosnia, Austria-Hungary.

Warrants drawn but not delivered:

21 warrants at \$25 each .... 525.00

Vouchers for 43 warrants aggregating .....1051.67

Total claim ..... 1576.67

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\$35,910.03

## SCHEDULE "C."

Statement of Warrants and Sums of Money Due Under the Workingmen's Compensation Law of the State of Washington, to Subject of the Kingdom of Bulgaria, a Former Alien Enemy of the United States of America, Which Have Been Reported to the Alien Property Custodian of the United States of America, and Demanded by him.

Claim No. 44993.

Date of Death: November 8, 1914.

Address: Glavonovsti, Verkovo, Bulgaria.

Warrants drawn but not delivered:

25 warrants at \$30 each . . . . . 750.00

Vouchers for 43 vouchers aggregating . . . . . 1150.00

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Total claim . . . . . \$1900.83

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff shall recover of and from the said defendants his costs and disbursements to be hereafter taxed; that the United States Marshal of the above-entitled court shall seize the warrants above described forthwith upon receipt of this judgment and deliver them to the clerk of the above-entitled court for the plaintiff in this action; that vouchers for the said claims for which warrants have not issued shall be issued by the defendants above named and delivered to the clerk of the above-entitled court for the said plaintiff within ten days from the entry of this judgment, to which judgment

defendants except and their exception is allowed.

Dated this 1st day of November, 1922.

EDWARD E. CUSHMAN,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 1, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [40]

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United States District Court, Western District of  
Washington, Southern Division.

No. 155—E.

THOMAS W. MILLER, Alien Property Custodian  
of the United States of America,  
Plaintiff,

vs.

EDWARD CLIFFORD, Superintendent of the De-  
partment of Labor and Industries of the  
State of Washington, and E. S. GILL, Su-  
pervisor of Industrial Insurance of the De-  
partment of Labor and Industries of the  
State of Washington,  
Defendants.

**Petition for Allowance of Appeal.**

The above-named defendants, conceiving them-  
selves aggrieved by the final decree made and en-  
tered in the above-entitled court on the 1st day of  
November, 1922, do hereby appeal from said final de-  
cree, and the whole thereof, to the United States Cir-

cuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Dated this 1st day of November, 1922.

L. L. THOMPSON,

As Attorney General of the State of Washington,

JOHN H. DUNBAR,

Assistant Attorney General of the State of Washington,

Solicitors for Defendants.

GUIE & HALVERSTADT,

Of Counsel.

Service of a true copy of petition for allowance of appeal [41] acknowledged this 1st day of Nov. 1922.

H. G. ROWLAND,

Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 1, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [42]



In the District Court of the United States, for the  
Western District of Washington, Southern Division.

No. 155—E.

THOMAS W. MILLER, Alien Property Custodian  
of the United States of America,  
Plaintiff,

vs.

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington, and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,  
Defendants.

**Assignment of Errors.**

Come now the defendants Edward Clifford, Superintendent of the Department of Labor and Industries of the State of Washington, and E. S. Gill, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington, by and through L. L. Thompson, Attorney General of the State of Washington, and John H. Dunbar, Assistant Attorney General of the State of Washington, and files the following assignment of errors upon which they will rely upon their appeal from the judgment made by this Honorable Court on the 1st day of November, 1922, in the above-entitled cause:

1. That the United States District Court for the Western District of Washington, Southern Division, erred in denying the motion to dismiss of the defendants filed against plaintiff's amended complaint herein.

2. That the said District Court erred in entering judgment in favor of the plaintiff and against the defendants.

L. L. THOMPSON,

Attorney General of the State of Washington,

JOHN H. DUNBAR,

Assistant Attorney General of the State of Washington [43]

Attorneys for Defendants.

Copy of assignment of errors acknowledged this 1st day of Nov. 1922.

H. G. ROWLAND,

Atty. for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 1, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [44]

United States District Court, Western District of  
Washington, Southern Division.

No. 155—E.

THOMAS W. MILLER, Alien Property Custodian  
of the United States of America,  
Plaintiff,

vs.

EDWARD CLIFFORD, Superintendent of the De-  
partment of Labor and Industries of the  
State of Washington, and E. S. GILL, Su-  
pervisor of Industrial Insurance of the De-  
partment of Labor and Industries of the  
State of Washington,  
Defendants.

**Order Allowing Appeal.**

Now on this 1st day of November, 1922, it is  
ORDERED that the appeal in the above-entitled  
cause be allowed as prayed for.

EDWARD E. CUSHMAN,  
District Judge of the United States, for the District  
of Washington, Southern Division.

Copy of order allowing appeal acknowledged this  
1st day of Nov. 1922.

H. G. ROWLAND,  
Attys. for Plaintiff.

[Indorsed]: Filed in the United States District  
Court, Western District of Washington, Southern  
Division. Nov. 1, 1922. F. M. Harshberger, Clerk.  
By Ed M. Lakin, Deputy. [45]

United States District Court, Western District of  
Washington, Southern Division.

No. 155—E.

THOMAS W. MILLER, Alien Property Custodian  
of the United States of America,  
Plaintiff,

vs.

EDWARD CLIFFORD, Superintendent of the De-  
partment of Labor and Industries of the  
State of Washington, and E. S. GILL, Su-  
pervisor of Industrial Insurance of the De-  
partment of Labor and Industries of the  
State of Washington,

Defendants.

**Order Fixing Amount of Appeal and Supersedeas  
Bond.**

Upon reading the petition of the above-named ap-  
pellants in the above-entitled cause for the allow-  
ance of an appeal to the United States Circuit  
Court of Appeals for the Ninth Circuit from the  
final judgment rendered and entered in the above-  
entitled cause,—

It is ORDERED that the appellants above named  
shall execute and file in the office of the Clerk of  
the above-entitled court a bond on appeal and super-  
sedeas, conditioned according to law in the sum  
of \$2500.00, with good and sufficient surety to be  
approved by the undersigned, and upon such ap-  
proval the same shall act as an appeal and super-  
sedeas bond pending said appeal.

Done in open court this 1st day of November, 1922.

EDWARD E. CUSHMAN,  
Judge of the United States District Court for the  
Western District of Washington, Southern Di-  
vision.

Copy of order fixing amount of appeal and super-  
seas bond acknowledged this 1st day of Nov. 1922.

H. G. ROWLAND,  
Attys. for Plaintiff.

[Indorsed]: Filed in the United States District  
Court, Western District of Washington, Southern  
Division. Nov. 1, 1922. F. M. Harshberger, Clerk.  
By Ed M. Lakin, Deputy. [46]

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United States District Court, Western District of  
Washington, Southern Division.

No. 155—E.

THOMAS W. MILLER, Alien Property Custodian  
of the United States of America,  
Plaintiff,

vs.

EDWARD CLIFFORD, Superintendent of the De-  
partment of Labor and Industries of the  
State of Washington, and E. S. GILL, Su-  
pervisor of Industrial Insurance of the De-  
partment of Labor and Industries of the  
State of Washington,

Defendants.



**Appeal and Supersedeas Bond.**

KNOW ALL MEN BY THESE PRESENTS: That Edward Clifford, Superintendent of the Department of Labor and Industries of the State of Washington, and E. S. Gill, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington, and National Surety Company of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to do business in the State of Washington, as surety, are held and firmly bound unto Thomas W. Miller, Alien Property Custodian of the United States of America, in the full and just sum of \$2500.00, to be paid to the said Thomas W. Miller, Alien Property Custodian of the United States of America, to which payments, well and truly to be made, we bind ourselves, our successors, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 1st day of November, 1922.

The condition of the foregoing obligation is such that,

WHEREAS, the appellants above named have duly appealed from the final judgment in the above-entitled cause to the United [47] States Circuit Court of Appeals for the Ninth Circuit; and

WHEREAS, the above-entitled court fixed the amount of the bond to be given by said appellants upon said appeal and as a supersedeas and appeal bond in the sum named as the penalty of this bond;

NOW, THEREFORE, if the appellants shall prosecute their appeal to effect and if they fail to make their plea good shall answer all damages and costs, then this obligation shall be null and void; otherwise to remain in full force and effect.

EDWARD CLIFFORD,

(Director)

Superintendent of the Department of Labor & Industries of the State of Washington.

E. S. GILL,

Supervisor of Industrial Insurance of the Department of Labor & Industries of the State of Washington.

NATIONAL SURETY COMPANY,

By JOHN D. FLETCHER,

Resident Vice-President.

[Corporate Seal] Attest: W. B. GILHAM,  
Resident Assistant Secretary.

Approved.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 1, 1922. F. M. Harshberger, Clerk.  
By Ed M. Lakin, Deputy. [48]

United States District Court, Western District of  
Washington, Southern Division.

No. 155—E.

THOMAS W. MILLER, Alien Property Custodian  
of the United States of America,  
Plaintiff,

EDWARD CLIFFORD, Superintendent of the De-  
partment of Labor and Industries of the  
State of Washington, and E. S. GILL, Su-  
pervisor of Industrial Insurance of the De-  
partment of Labor and Industries of the  
State of Washington,

Defendants.

### **Citation on Appeal.**

United States of America,—ss.

To Thomas W. Miller, Alien Property Custodian of  
the United States of America, GREETING:

You are hereby cited and admonished to be and  
appear before the United States Circuit Court of  
Appeals for the Ninth Circuit, at the City of San  
Francisco, in the State of California, within thirty  
(30) days from the date hereof, to wit: On the 1st  
day of December, 1922, pursuant to an appeal filed  
in the Clerk's office of the District Court of the  
United States, for the Western District of Wash-  
ington, Southern Division, wherein the above-named  
appellants are appellants and you, the appellee, and  
show cause, if any there be, why said decree should  
not be corrected, and speedy justice be done to the  
parties in that behalf.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States, for the Western District of [49] Washington, Southern Division, this 1st day of November, 1922.

EDWARD E. CUSHMAN,  
Judge of the District Court of the United States  
for the Western District of Washington, Southern Division.

Attest: F. M. HARSHBERGER,  
Clerk.

By Ed M. Lakin,  
Deputy Clerk of the United States District Court  
for the District of Washington, Southern Division.

Copy of citation on appeal acknowledged this 1st day of Nov., 1922.

H. G. ROWLAND,  
Attys. for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 1, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [50]

United States District Court, Western District of  
Washington, Southern Division.

No. 155—E.

THOMAS W. MILLER, Alien Property Custodian  
of the United States of America,

Plaintiff,

vs.

EDWARD CLIFFORD, Superintendent of the De-  
partment of Labor and Industries of the  
State of Washington, and E. S. GILL, Su-  
pervisor of Industrial Insurance of the De-  
partment of Labor and Industries of the  
State of Washington,

Defendants.

**Praeceptum for Transcript of Record.**

To the Clerk of the Above-entitled Court:

Please make, duly authenticate, and transmit to  
the Clerk of the Circuit Court of Appeals for the  
Ninth Circuit, sitting at San Francisco, a transcript  
of the record on appeal in the above-entitled cause,  
to include the following:

1. Original bill of complaint.
- 1A. Amended bill of complaint.
2. Motion to dismiss amended bill of complaint.
3. Order denying motion to dismiss amended com-  
plaint.
4. Decree and judgment.
5. Petition for appeal.
6. Assignments of error.



7. Order allowing appeal and order fixing appeal and supersedeas bond.
8. Appeal and supersedeas bond.
9. Citation.
10. This praecipe.
11. Clerk's certificate.

L. L. THOMPSON,

Attorney General of the State of Washington.

JOHN H. DUNBAR,

Assistant Attorney General of the State of Washington.

GUIE & HALVERSTADT,

Of Counsel. [51]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 1, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [52]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages numbered from 1 to inclusive, constitute a true and correct transcript of the record and proceedings in the case of Thomas W. Miller, Alien Property Custodian of the United States of America, Plaintiff, *versus* Edward Clifford, Super-

intendent of the Department of Labor and Industries of the State of Washington, et al., No. 155—Equity, in said District Court, as required by Praecipe of Attorneys for Defendants and Appellants filed and shown herein as the originals thereof appear on file and of record in my office in said District at Tacoma.

I further certify and return that I hereto attach the original citation on appeal herein.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the appellants herein for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fees (Sec. 828 R. S. U. S.), for making record and return, 142 folios @ 15¢ each .....	\$21.30
Certificate of Clerk to Transcript, 3 folios @ 15¢ each .....	.45
Seal to said Certificate .....	.20

ATTEST my hand and the seal of said District Court at [53] Tacoma, in said District, this 25th day of November, A. D. 1922.

[Seal]

F. M. HARSHBERGER,

Clerk.

By Alice Huggins,

Deputy Clerk. [54]

[Endorsed]: No. 3944. United States Circuit Court of Appeals for the Ninth Circuit. Edward Clifford, Superintendent of the Department of Labor and Industries of the State of Washington, and E. S. Gill, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington, Appellants, vs. Thomas W. Miller, Alien Property Custodian of the United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed November 27, 1922.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



IN THE  
**UNITED STATES  
CIRCUIT COURT  
OF APPEALS**  
FOR THE NINTH CIRCUIT

---

THOMAS W. MILLER, Alien Property Custodian of the United States of America,  
*Appellee,*

V.

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,  
*Appellants.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION,  
TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

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**BRIEF OF APPELLEE**

---

H. G. ROWLAND,  
*Attorney for and Representative of Appellee.*

DIX H. ROWLAND,  
*Of Counsel.*





NO. ....IN EQUITY

IN THE

**UNITED STATES  
CIRCUIT COURT  
OF APPEALS**

FOR THE NINTH CIRCUIT

THOMAS W. MILLER, Alien Property Custodian of the United States of America,  
*Appellee,*

v.

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,  
*Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION,  
TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR  
THE NINTH CIRCUIT.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

**BRIEF OF APPELLEE**

H. G. ROWLAND,  
*Attorney for and Representative of Appellee.*

DIX H. ROWLAND,  
*Of Counsel.*



NO. ....IN EQUITY

IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS W. MILLER, Alien Property Custodian of the United States of America,  
*Appellee,*

v.

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,  
*Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION,  
TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR  
THE NINTH CIRCUIT.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

## BRIEF OF APPELLEE

### STATEMENT OF THE CASE

While the Statement of the Case made by appellants is in the main correct, yet in order that the court may clearly understand appellee's position, we

deem a short statement on our part necessary.

The plaintiff is the Alien Property Custodian of the United States of America, appointed by the President of the United States, under and by virtue of an act of Congress of the United States of America known as the "Trading with the Enemy Act" passed on the 6th day of October, 1917, and the acts amendatory and supplementary thereto, possessing all the powers granted by said acts of Congress and the executive orders issued in pursuance thereof; (Amended complaint paragraph I, Page 36 of Transcript of Record); that the defendant Edward Clifford is the Superintendent of Labor and Industries of the State of Washington and the defendant E. S. Gill is the Supervisor of Industrial Insurance, acting under said Clifford; that the said Superintendent and Supervisor exercise the duties formerly exercised by the commissioners of the Industrial Insurance Department of the State of Washington (Paragraph II of Amended complaint, Page 36 of Transcript of Record); that all the claims involved herein had been allowed by the defendants and their predecessors to the alien enemy claimants and warrants issued for said claim in the names of the alien enemy claimants in many cases, but said warrants were held by appellants but not delivered when war was declared by United States. There remained nothing for the appellants to do in regard to the claims for which no warrant had issued, except to give a voucher to claimants therefore. (Para-



graph III of Amended complaint, Page 38 of Transcript of Record).

All the claims were reported to the Alien Property Custodian while the United States was at war with the belligerent powers of which the claimants were subjects in pursuance with the provisions of the Trading with the Enemy Act. That a demand was made by the Custodian for the amounts due on all these allowed claims before the declaration of peace between the United States and the belligerent powers, the Custodian after investigation having determined that said warrants and said sums of money due as shown by the schedules attached to the complaint were due to enemies or allies of enemies of the United States not holding a license from the President, (Paragraph IV of Amended complaint, Page 40 of Transcript of Record); that said warrants and said funds are in the sole control of appellants and no State officer, except appellants, stands in the way of the delivery of them to appellee (Paragraph IV of Amended complaint, Page 40 of Transcript of Record).

The warrants are in the custody of the Clerk of the District Court at Tacoma. Upon refusal of the appellants to deliver said warrants and said funds to appellee this action was brought for their possession. The State of Washington was originally a party but was dismissed out by the Court, who held that only the appellants were necessary parties. The appellants filed a motion to dismiss against appel-

lee's amended complaint. This was overruled and the appellants, refusing to plead further, judgment went against them.

## ARGUMENT.

## I

HAD THE DISTRICT COURT JURISDICTION OF THE  
CAUSE OF ACTION?

The action was brought under the Trading with the Enemy Act which in the very recent decision of *Stoehr v. Wallace*, 255 U. S. 241, 65 Law Ed. 610, has been held to apply in all actions of a possessory nature involving seizures of property of alien enemies or their allies upon land. In the language of this opinion:

“The Trading with the Enemy Act, whether taken as originally enacted, October 6, 1917, chap. 106, 40 Stat. at L. 411, Comp. § Stat. § 3115 $\frac{1}{2}$  a, Fed. Stat. or as since amended, March 28, 1918, chap 28, 40 Stat. at L. 459, 460; November 4, 1917, chap, 201, 40 Stat. at L. 1020; July 11, 1919, chap. 6, 41 Stat. at L. 35; June 5, 1920, chap. 241, 41 Stat. at L. 977, is strictly a war measure and finds its sanction in the constitutional provision art. 1, § 8, cl. 11, empowering Congress “*to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.*” *Brown v. United States*, 8 Cranch, 110, 126, 3 L. ed. 504, 510; *Miller v. United States (Page v. United States)* 11 Wall. 268, 305, 20 L. ed 135, 144.”

Commenting in the case of *Stoehr v. Wallace*, 255 U. S. 24, the Supreme Court said:

“It is with parts of the act which relate to captures on land that we now are concerned. They invest the President with extensive powers respecting the sequestration, custody, and disposal of enemy property. By § 5 he is in terms authorized to exercise “any” of these powers “through such officer or

officers as he shall direct." By § 6 he is authorized to appoint and "prescribe the duties of" an officer to be known as the Alien Property Custodian. By §7c, as amended November 4, 1918, direct provision for sequestering enemy property is made as follows:

"If the President shall so require any money or other property including \* \* \* choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act."

But the jurisdiction of the District Court of this action does not depend alone on the Trading with the Enemy Act.

The district courts are by previous acts of Congress given jurisdiction of this class of cases. Section 24 of the Judicial code provides that the district courts shall have original jurisdiction in:

"First: Suits of a civil nature, at common law or in equity, brought by the United States or by any officer thereof authorized by law to sue \* \* \*

"Third: \* \* \* of all seizures on land and waters not within admiralty and maritime jurisdiction \* \* \*"

The Supreme Court of the United States has held that an action brought by the Alien Property Cus-

todian for possession of securities or property comes under this last class. *Stoehr v. Wallace*, 255 U. S. 241, 65 L. ed. 604; *Central Trust Co. v. Garvan*, 254 U. S. 533, 65 L. ed. 403.

So it appears that Congress had power to make all necessary rules concerning captures on land and water, and clothed the District Courts with the necessary power in order to put in effect the Constitutional powers to enable it to successfully carry on the World War and make the necessary settlements with the alien belligerents and their allies and to still further carry out this power, enacted the Trading with the Enemy Act, which provided for the Appointment of the Alien Property Custodian and defined his powers.

And it is held that the determination of the Alien Property Custodian as to what property is enemy owned and what should be demanded by him is the determination of the President of the United States, is final and conclusive and that the remedy of one not satisfied therewith is to make a claim under Sec. 9 of said act.

*Central W. Trust Company v. Garvan*, 254 U. S. 554, Confiscation Cases (*United States v. Clarke*), 20 Wall 92, 109, 22 L. ed. 320, 323, *Stoehr v. Wallace*, 255 U. S. 245 et cet.

The Trading with the Enemy Act expressly gives the Districts Court of the United States Jurisdiction as to actions arising under it. Section 17, of said act, found in Vol. 40, Part 1, page 411, Statutes at



Large, reads as follows:

“That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court, as provided in sections 128 and 238 of the Act of March 3, 1911, entitled ‘an act to codify, revise and amend the laws relating to the judiciary.’ ”

Furthermore, the President of the United States, whose representative the appellee is, as head of the executive department of the government given the power and duty of carrying on war, and sequestration of enemy property is one of the necessary things to be done under this power.—Section 2, Paragraph I, Constitution.

## II

Does the Trading with the Enemy Act apply to the case at issue?

1. The act in subdivision C, Section 7, reads as follows:

“If the President shall so require, any money or other property owing to, belonging to, or held for, by on account of, on behalf of, or for the benefit of an enemy, or ally of an enemy, not holding a license granted by the President hereunder, which the President, after investigation, shall determine is so owing, or so belongs, or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian.”

Section 2, subdivision C, of the Trading with the

Enemy Act, defines the word "person" as follows:

"The word 'person' as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or *body politic*."

While not conceding that the present action is one against the State of Washington, the provision of the act are broad enough to include a State.

The definition of a body politic is not borne out by the authorities cited in paragraph III of appellants' brief, nor is it subject to the construction placed on it by appellants.

We will cite a few of the text writers on the subject:

Anderson's Law Dictionary, Page 127, defines it as follows:

"The governmental, sovereign power, a city or a state."

Black's Law Dictionary, as stated in appellants' brief, says that it is a name applied to the State.

The Supreme Courts of various States have defined it as "The State or nation as an organized political body of people collectively."

*People v. Snyder*, 279 Ill., 435-440, 117 N. E. 119.

But, fortunately, the Supreme Court of the United States, in an opinion written by Chief Justice Gray, quoting Chief Justice Marshall, defined the term so that in so far as its meaning and interpretation by the United States Courts is concerned, there can be no doubt. The United States Supreme

Court takes the same views as that taken by the highest Court of Illinois. In the case of *Von Brocklin v. Anderson*, 117 U. S. 119, 29 L. ed. 846, Justice Gray says:

“In the words of Chief Justice Marshall: ‘The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American People, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government with a perfect right to use them freely, in order to accomplish the object of its institution.’” (*U. S. v. Maurice*, 2 Brock. 96, 109).

And Webster’s New International Dictionary, 1921 Edition, defines body politic as “The state as a politically organized body of persons or as exercising political functions.”

So we see that the Trading with the Enemy Act using the term “body politic” in its usual accepted meaning refers to the State or sovereign power.

2. The contention is made by the appellants that the District Courts have lost jurisdiction because of the termination of the war.

It was held that the signing of the armistice did not terminate the control of the Alien Property Custodian. *Ins. Co. v. Ins. Co.*, 254 Fed. 852, and an examination of the treaties of peace between the United States and Germany and Austria clearly show that his control was not changed by the

treaties, but was preserved by them.

Section 5 of the treaty with Germany covers the subject and reads as follows:

“All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government or its agents, since July 31, 1914, loss, damage, or injury to their persons or property directly or indirectly. “Section 5 of German Treaty, proclaimed Nov. 21, 1921.”

The Austro-Hungarian Treaty of Peace with the United States contains a similar provision. See



Section 5 of Austrian treaty, proclaimed November 17, 1921.

These treaties specially protect the Alien Property Custodian in the possession of all Alien-owned property, *demand* for which had been made prior to the Treaty of Peace, so the case at bar is expressly provided for.

3. It is contended by appellants that the claims involved in this action are of such a character as cannot be taken possession of on account of Section 6604-10, Rem. 1915 Code of Washington, which provides that prior to the issuance of the warrants, no assignment by operation of law or otherwise shall be made. This contention is swept away by the decision of the United States Supreme Court in *Central Union Trust Company v. Garvan*, 254 U. S. 269, reading as follows:

“To the conclusion that we reach, it is objected that the Custodian gets a good deal more than bare possession,—that the property is to be conveyed to him; and that, by the Act of March 28, 1918, chap. 28, 40 Stat. at L. 459, 460, enlarging § 12, the Custodian “Shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, etc., to him, and is given the power to sell and manage the same as though he were absolute owner. All this may be conceded if no claim is filed. But this act did not repeal § 9, which is amended by the later Acts of July 11, 1919, chap. 6, 41 Stat. at L. 35, and of June 5, 1920, chap. 241, 41 Stat. at L. 977, and, as we have said, provides for immediate claim and suit, and requires the property in cases of suit to be



retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result. The present proceeding gives nothing but the preliminary custody, such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned, and does no more." See also *Kahn v. Garvan*, 263 Fed. 909.

Under Section 9, the appellants can assert every right that they possess.

The appellants argue that a claim due one under the Workman's Compensation act being in the nature of insurance is different from other claims.

The same contention was made in the last mentioned case. It was contended that the funds in the Garvan case were special funds for the security of American Policy holders. The Court held that even though such were the case, the determination of the Alien Property Custodian was final and conclusive in a possessory action and could not be inquired into.

4. The contention is made that the Trading with the Enemy Act is an interference with the Police Power of the State by the Federal Government. It is nothing of the kind, but is strictly a war measure and finds its sanction in the constitutional provision; Art. 1, Sec. 8, Cl. 11, empowering Congress: "To declare war, grant letters of marque and reprisal and make rules concerning captures on land and water."

Judge Cooley in his "Constitutional Limitations," on page 709, has well explained how the Police power of a state cannot conflict with the provisions

of the constitution of the United States such as the right of Congress to provide for all rules and regulations governing the seizure of property upon land and the sequestration of enemy property in time of war. The section reads:

“But while the general authority of the State is fully recognized, it is easy to see that the power might be so employed as to interfere with the jurisdiction of the general government; and some of the most serious questions regarding the police of the States concern the cases in which authority has been conferred upon Congress. In those cases it has sometimes been claimed that the ordinary police jurisdiction is by necessary implication excluded, and that, if it were not so, the State would be found operating within the sphere of the national powers, and establishing regulations which would either abridge the rights which the national Constitution undertakes to render absolute, or burden the privileges which are conferred by law of Congress, and which, therefore, cannot properly be subject to the interference or control of any other authority. But any accurate statement of the theory upon which the police power rests will render it apparent that a proper exercise of it by the State cannot come in conflict with the provisions of the Constitution of the United States.”

*Stoehr v. Wallace*, 255 U. S. 240, and this is expressly kept in effect by the provisions of the Austrian and German Treaties.

The case cited by Appellants of *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, is against their contention, but is an authority that where the police power of a state conflicts with the War power of Congress, that the former must give way.

The emergency that caused Congress to pass the Trading with the Enemy Act did not cease with the Peace Treaties as shown herein by the treaties themselves and as held by the United States Supreme Court.

The contention of the Appellants is that the present action is in its amended form one against the State of Washington, and as such must be brought in the Supreme Court.

The Constitution of the United States provides:

“The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; \* \* \* To controversies to which the United States shall be a party \* \* \*

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the Supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.” (Act III, Sec. 2, Const. of United States).

The Judiciary Act of 1789 gave the District Courts of the United States jurisdiction over the class of cases involving consuls and ambassadors. It was contended that original jurisdiction being in the Supreme Court of the United States, it was not

within the power of Congress to place it elsewhere and that as applied to action involving consuls the act was unconstitutional. The Supreme Court held that the United States Constitution did not attempt to rest exclusive but only original jurisdiction in the Supreme Court.—*Bors v. Preston*, 111 U. S. 256, 28 L. ed. 420.

Likewise, Congress in exercise of its constitutional right, possessed the power to provide what tribunal should try cases involving the Trading with the Enemy Act and designated the District Courts of the United States. It had the same power to make this applicable to states as it previously did to consuls. This it did in making the act apply to a "body politic."

It is not a question of the amendment of the Judicial code by implication, but a question of providing a constitutional tribunal for trying cases arising under a War Measure.

The Supreme Court has held that Art. III of the Constitution of the United States has no application in cases where the United States is a party.—*U. S. v. Louisiana*, 123 U. S. 32, 31 L. ed. 69.

That this case is one by or against the United States cannot be questioned, even though it is brought by an executive officer.

*The State of Louisiana v. James Rudolph Garfield, etc.*, 211 U. S. 70 53 L. ed. 92; *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. ed. 935; *Naganab v.*



*Hitchcock*, 202 U. S. 473, 50 L. ed. 1113; *Minn v. Hitchcock*, 185 U. S. 373.

The Alien Property Custodian takes possession of this property for the United States. It can only be taken away by act of Congress.

### III

According to the overwhelming weight of authority, the present action is not one against the State.

It is difficult, sometimes, to differentiate and determine when a case is against a State and when against the officers of a State.

As a rule the test is if the action arises on account of some arbitrary or criminal act on the part of an officer or is the result of a tort committed by such officer it is not against the State, and this was the view taken by the learned Judge of the district Court when he dismissed the State of Washington as such from the action. An examination of the Amended Bill will disclose that the State Officials as such had done all that they were requested to do under the Workman's Compensation Act. They had approved and allowed the claims and drawn warrants for a large part of the compensation due. The State Treasurer is ready and willing to cash them when presented. The Auditor is ready and willing to issue warrants for the balance due on receiving from the appellants' vouchers therefore.

Sec. 16 of the Trading with the Enemy Act provides, among other things, that any person who re-



fuses to comply with any demand of the President of the United States, issued in compliance with the provision of said Act, shall be guilty of a felony. The refusal on the part of the appellants to comply with the order of the President to deliver possession of this property on the demand of the Custodian, is an unlawful act of the appellants and cannot be imputed to the State of Washington.

Appellants' contention that the present action in its present form is one against the State of Washington is based largely on the decision of the United States Supreme Court in *Lankford v. Platte Iron Works Company*, 235 U. S. 461, 59 L. ed. 316, 35 Sup. Court Rep. 173. The case might have some application, were it not that the case at bar arises on account of the torts of State officers in refusing to comply with the demands of the President of the United States and in violating a Federal Statute. The Supreme Court of the United States in a much later decision has shown where the line is to be drawn in distinguishing when an action is against a State and when it is not.—*Johnson v. Lankford*, 245 U. S. 544, 62 L. ed. 460.

In the case at bar all the claims had been allowed before the Custodian made his demand and \$15,000 in warrants had been issued in the name of the alien enemies and were held by the appellants because of their inability to deliver them. The funds were no longer State funds, but belonged to the aliens because the claims had been passed on and approved.

Furthermore, the appellants had reported to the Custodian that they were not State funds, but belonged to such aliens. (Amended Complaint Paragraph IV, Pages 39 and 40 of Transcript of Record).

The immunity granted the state does not extend to damage done by its officers though acting under color of her authority, if illegally done. *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 55 L. ed. 890, 35 L. R. A. (N. S.) 243, 31 Sup. Ct. Rep. 654.

No judgment is sought against state funds in the present action, but only possession of alien owned property which has been reported to the Alien Property Custodian by the appellants as belonging to alien enemies and their allies. *Reagan v. Farmer's Loane Trust Company*, 154 U. S. 362, 38 L. ed. 1014.

In the case of *Johnson v. Lankford*, 245 U. S. 544, Justice McKenna correctly stated the law: "The relief sought is against him (the defendant) because of his wilful or negligent disregard of the laws of the state \* \* \*, We think the question, therefore, should be answered in the negative; that is, that the action is not one against the state. To answer it otherwise would be to assert, we think, that whatever an officer does, even in controvention of the laws of the state, is state action, identifies him with it, and makes the redress sought against him a claim against the state, and therefore prohibited by the 11th Amendment. Surely an officer of a state may be delinquent without involving the state in delinquency, indeed, may injure the state by delinquency

as well as some resident of the state, and be amenable to both." Commenting further, the Court said: "The present case finds example in *Hopkins v. Clemson Agricultural College*, 221 U. S. 635, 55 L. ed. 890, 35 L. R. A. (N. S.) 243, 31 Sup. Ct. Rep. 654, where the college was held liable for acts of trespass upon private property and it was said by Mr. Justice Lamar, speaking for the court, that immunity from suit was a high attribute of sovereignty—a prerogative of the state itself—which cannot be availed of by public agents when sued for their own torts"; and it was further said: "The 11th Amendment was not intended to afford them (public agents) freedom from liability in any case where, under color of their office, they have injured one of the state's citizens."'

Surely a state officer whose unlawful acts interfere with the rights of the President of the United States in carrying on a great war and settling with the belligerents afterwards, cannot claim when sued, as in the present case, for property which he has reported as belonging to alien enemies; that it is an action against the state over which the district courts have no jurisdiction.—*Johnson v. Lankford*, 245 U. S. 544.

The case of *Truax v. Raich*, 239 U. S. 35, 60 L. ed. 131, clearly draws the distinction between acts of officers erroneously performed and those arising in tort, and holds that the latter acts do not make a state liable. We quote from this opinion written by Mr. Justice Hughes:

"As the bill is framed upon the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement

of the laws of the state, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the state. Whatever doubt existed in this class of cases was removed by the decisions in *Ex parte Young*, 209 U. S. 123, 155, 161, 52 L. ed. 714, 727, 729, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, which has repeatedly been followed. *Ludwig v. Western U. Teleg. Co.*, 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; *Western U. Teleg. Co. v. Andrews*, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U. S. 135, 155, 54 L. ed. 970, 976, 30 Sup. Ct. Rep. 633; *Hopkins v. Clemson Agri. College*, 221 U. S. 636, 643-645, 55 L. ed. 890, 894, 895, 35 L. R. A. (N. S.) 243, 31 Sup. Ct. Rep. 654; *Philadelphia Co. v. Stimson*, 223 U. S. 607, 620, 56 L. ed. 572, 576, 32 Sup. Ct. Rep. 340; *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 293, 57 L. ed. 510, 517, 33 Sup. Ct. Rep. 312."

#### IV

In conclusion we urge upon the Court:

1st. The 11th Amendment of the Constitution of the United States has no application to the present action, as it is not an action prosecuted by citizens of one of the United States against a state, the same being brought by the United States by one of its executive officers against State Officers acting in violation of a Federal Statute.

2nd. The Trading with the Enemy Act was passed by Congress by virtue of Art. 8, of the Constitution of the United States giving it the right to make rules concerning captures on land and water.



Such Act designated the District Courts of the United States as the tribunals having jurisdiction over violations and was a proper exercise of the war power.

3rd. The War power of congress, the authority of the Alien Property Custodian, and the jurisdiction of Federal Courts were not ended by the Treaties with Germany and Austria, but were expressly reserved by the treaties.

4th. The property in question was reported to the Custodian as belonging to alien enemies and demand made by him before the Treaty of Peace was signed, the State making no claim therefor.

5th. The action is not against the state, but against officers acting tortiously and seeking to interfere with the rights of the President of the United States.

6th. The Trading with the Enemy act being an exercise of the War power of Congress, the police power of the State in so far as it conflicts with it must give way.

7th. The State officers are fully protected by the Trading with the Enemy act in surrendering the custody of the property involved herein to the Alien Property Custodian and can assert any right which they may have under Sec. 9 of the Act.

8th. It was within the Power of Congress to provide what tribunal could exercise its war power and it could enact such legislation that would make



it possible for the United States to sue a State, in like manner, as it did when, by the act of 1789, it gave the District Courts Jurisdiction over consuls.

9th. The action being one in equity for the possession of alien owned property brought by an officer of the United States, and being an action under the laws of the United States is a proper subject for the Jurisdiction of the District Courts of the United States; and the Court, furthermore, has Jurisdiction as the action arises under the Constitution of the United States, the Trading with the Enemy Act having been passed for the express purpose of carrying into effect the Federal Constitution.

10th. Neither the appellants nor the State of Washington lose by appellants complying with the decree of the District Court. The decision is right and should be affirmed.

H. G. ROWLAND,  
*Representative of and Attorney for Appellee.*

DIX H. ROWLAND,  
*Of Counsel.*



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IN THE  
United States Circuit  
Court of Appeals

FOR THE NINTH CIRCUIT

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EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insur- ance of the Department of Labor and Industries of the State of Washington, <i>Appellants,</i>	} No. ....
v.	
THOMAS W. MILLER, Alien Property Custodian of the United States of America, <i>Appellee.</i>	

---

PETITION FOR REHEARING

---

L. L. THOMPSON,  
*Attorney General of the State of Washington.*

JOHN H. DUNBAR,  
*Assistant Attorney General of the State of Washington.*  
*Attorneys for Appellants.*



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**PETITION FOR REHEARING**

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Come now the appellants by their attorneys and respectfully petition for rehearing in the above entitled case for the following reasons:

I.

In the opinion, this court states that the want of jurisdiction in the court below is the sole question presented for consideration, and the only question de-

cided in the opinion is that this action is not an action against the State of Washington.

The motion to dismiss the complaint was made on two grounds, namely, that the court had no jurisdiction over the persons of the defendants or either of them or the subject matter of the action, and also that the complaint did not state facts sufficient to constitute a cause of action. There was thus squarely raised the question whether the Trading with the Enemy Act applies to a state, which apparently, from the court's own language in the opinion, was not considered.

In defining the term "person" in the Trading with the Enemy Act, the term "state" was not used. The Trading with the Enemy Act was enacted for the purpose of restraining persons from giving aid and comfort to aliens in time of war to the end that our government might successfully prosecute the war and maintain its existence. We do not believe that it was the congressional apprehension that a state would give aid and comfort to aliens in time of war, nor that congress intended that the terms of the Trading with the Enemy Act should apply to a state.

## II.

It was also argued both in appellant's brief and in the oral argument that the Trading with the Enemy Act is not applicable to a state where prop-

erty sought is not reduced to possession during the war. This argument is based on the principle that the Trading with the Enemy Act is in conflict with a state statute which was enacted by virtue of the police power of the state, and that congress has no power to enact legislation by virtue of the police power. The exception to this rule is that congress may so legislate during the war, but it is respectfully submitted that this power ceases when the war ceases. In other words, when the reason for the exception ceases, the exception itself ceases to exist. This contention, in so far as it appears in the court's opinion, was not considered.

### III.

This is an action against the state. The case of *Board of Liquidation, et al., v. McCoomb*, 92 U. S. 531, is cited as an authority to the effect that the test of whether or not an action is one against the state is whether the officer is required to exercise any discretion in the act he is requested to perform. This test is apparently only applicable in cases of mandamus. Applying the rule announced in the *McConnaughy* case cited in the court's opinion, it would seem that this was in fact an action against the state. As a portion of the accident fund is used for the administrative expenses of the Department of Labor and Industries, and such a course was sustained by the

supreme court of this state in the case of *State, ex rel., Bloedel-Donovan Lumber Mills Company v. Clausen*, 22 Wash. Dec. 325, so that in its last analysis, the only thing affected by the judgment is a fund of the state. There is no claim here that the appellants are acting under the color of an unconstitutional statute, nor is there any showing or is it alleged that the appellee will suffer any injury if the appellants refuse to turn over these warrants. The real test is, who is affected by the judgment. This action is either against the state or it is against the appellants individually. Certainly it cannot be claimed that the judgment in this case in any manner, shape or form, affects the appellants individually.

The Langford case is distinguished in the opinion because there the judgment ordered the defendants to pay certain certificates of deposit, whereas in the present case, the judgment simply orders the marshal to seize the warrants that are issued and orders the appellants to deliver to the auditor vouchers for those warrants which are not issued, and that for this reason it is not a money judgment. While there is a distinction in fact on this point between the two cases, we do not believe that there is a legal distinction. In any event, under the decree entered in this case, the appellee is entitled to the possession of state warrants and he may do with them as he pleases.



He might hawk, barter and discount them on the market to the detriment of the State's credit.

“A warrant on a municipal corporation is a general order payable when the funds are found. *Shelley v. St. Charles County Court*, 21 Fed. 699. It is, in effect, in this state an assignment *seriatim* of that amount of the funds against which it is drawn.” *State ex rel. Wehe v. Pasco Reclamation Company*, 90 Wash. 606. If the state refuse to pay these warrants by virtue of this court's language in distinguishing the Langford case, and an action were instituted against the state treasurer to compel him to pay said warrants, it might be contended that inasmuch as this court had held that the appellee was legally entitled to the possession of these warrants, it was his duty to pay said warrants and that his act in doing so would be purely ministerial in character and that he was acting in excess of his authority in refusing to make such payments, and that his act in refusing amounted to a tort, and that by reason of such tort, the plaintiff in the action had sustained a damage, and that for this reason it still would not be an action against the state. This would be doing, in a roundabout manner, exactly what the supreme court in the Langford case said could not be done, if this court's distinction of the Langford case is sound.

The issuance of a municipal warrant is an assignment of that amount of the funds against which it is

drawn. The result of the judgment entered in this case would be that the appellee is legally entitled to assignments of the accident fund of the State of Washington. We have always considered the issuance of state warrants and their payment, steps of equal legal significance in disbursing a state fund. Apparently this court holds, in distinguishing the Langford case, that the contrary is true. We assume that the court's holding is that the judgment entered in the district court does not compel the state to cash these warrants, but only decrees that the appellee is entitled to their possession, or otherwise the Langford case could not be distinguished from the case at bar. If this is the court's ruling, we respectfully petition that the opinion be modified to make this point more clear and specific, so that this court's opinion could not be *res adjudicata* to any defense that the state treasurer might interpose to an action instituted to compel him to cash such warrants.

It is also stated in the opinion that if an alien had prosecuted a similar suit to this in a proper court of the state, it would scarcely be contended that such a proceeding was a suit against the state. In the case of *Maddox v. Industrial Insurance Commission*, 119 Wash. 21, an injured workman instituted an action against the Industrial Insurance Division, and the court there held that the superior court had no jurisdiction of an action of this character; that his only

remedy was by appeal as prescribed in the Workmen's Compensation Act of this state. If such an action was not in fact an action against the state, it might properly be said that it could be waged. In any event, certainly an injured workman could not wage an action of that character in the district courts of the United States.

Respectfully submitted,

L. L. THOMPSON,

*Attorney General of the State of Washington.*

JOHN H. DUNBAR.

*Assistant Attorney General of the State of Washington.*

*Attorneys for Appellants.*

STATE OF WASHINGTON, }  
County of Thurston, } ss.

JOHN H. DUNBAR, being first duly sworn on oath deposes and says: That he is one of the attorneys of record for the appellants in the above entitled case, and that he hereby certifies that, in his judgment, this petition for a rehearing is well founded, and that it is not ~~unjust~~ *interposed for delay* for appellee.

.....  
Subscribed and sworn to before me this *22*  
day of March, 1923.

.....  
*Clyde S. Jeffers*

Notary Public in and for the State of Washington, residing at Olympia.









